

THE RISE OF THE REPRODUCTIVE BROTHEL IN THE GLOBAL ECONOMY:  
SOME THOUGHTS ON REPRODUCTIVE TOURISM,  
AUTONOMY, AND JUSTICE

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INTRODUCTION

In 1983, in her book *RIGHT-WING WOMEN*, feminist theorist Andrea Dworkin described a phenomenon she labeled the “reproductive brothel.”<sup>1</sup> She believed that it was the next expression of women’s reproductive capacities under male control.<sup>2</sup> In the reproductive brothel Dworkin envisioned, the techniques and technologies used in animal husbandry are used on women—without their will.<sup>3</sup> Women are gathered together in confined areas and their reproductive capacities sold to men as commodities.<sup>4</sup> Under this system, women are fungible or interchangeable; they are simply nothing more than reproductive commodities.<sup>5</sup> Like sexual prostitution, in the reproductive brothel, “there is no humanity for women. . . . It uses the women in it until they are used up. . . . The woman is easily reduced to what she sells.”<sup>6</sup> Dworkin also recognized that the reproductive brothel would be a global development and understood in liberal terms as facilitating women’s freedom and autonomy, just as prostitution is understood under liberal theory. Dworkin states:

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<sup>1</sup> ANDREA DWORKIN, *RIGHT-WING WOMEN* 176 (1983).

<sup>2</sup> *Id.* During the same period, theorist Gena Corea painted a similar but more detailed picture. GENA COREA, *THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS* 276-81 (1986) (describing how reproductive techniques and technologies used in animal husbandry could be forcibly used on women for eugenic purposes).

<sup>3</sup> *See* DWORKIN, *supra* note 1, at 185.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> DWORKIN, *supra* note 1, at 185. Margaret Atwood continues this theme in the much-acclaimed novel, *THE HANDMAID’S TALE* (1st ed. 1985). In the novel, the ruling class enslaves young women (called “handmaids”) for their reproductive capabilities in an era of declining births due to large-scale sterility (presumably from pollution and sexually transmitted disease). Each enslaved woman is given a slave name that describes her function of belonging to a man of the ruling class. The protagonist, Offred (literally Of “Fred,” the name of her owner) understands her objectification—she describes herself not as a concubine or as a slave, but rather as a tool, a “two legged womb”—just something to be used. *Id.*

The arguments as to the social and moral appropriateness of this new kind of sale simply reiterate the view of female will found in discussions of prostitution: does the state have a right to interfere with this exercise of individual female will (in selling use of the womb)? if [*sic.*] a woman wants to sell the use of her womb in an explicit commercial transaction, what right has the state to deny her this proper exercise of femininity in the marketplace? Again, the state has constructed the social, economic, and political situation in which the sale of some sexual or reproductive capacity is necessary to the survival of women; and yet the selling is seen to be an act of individual will—the only kind of assertion of individual will in women that is vigorously defended as a matter of course by most of those who pontificate on female freedom.<sup>7</sup>

While many viewed Dworkin's predictions with skepticism in the 1980s, since the 1990s, we have seen the development of surrogacy, including gestational surrogacy, and the increasing normalization and globalization of its practice.<sup>8</sup> In just a few decades, the practice of surrogacy and gestational surrogacy seems to have become, for some, a preferred method of family building.<sup>9</sup> Surrogacy has become embedded in our culture because it gives individuals an alternative way to create children that are their genetic children, or children that can pass as their genetic children, in a culture that gives preferences to genetic relationship over other types of relationships that constitute the human experience.<sup>10</sup> Moreover, the development of gestational

<sup>7</sup> DWORKIN, *supra* note 1, at 182.

<sup>8</sup> For example, in 1986, Marybeth Whitehead, the surrogate involved in the *Baby M.* case, was demonized as selfish when she sought custody of the child to whom she gave birth and to whom she was the genetic mother. *See generally* In re Baby M., 537 A.2d 1227 (N.J. 1988). The discourse about surrogacy has changed much in the succeeding decades; surrogate mothers are now consistently viewed as kind, altruistic. *See* Richard Storrow, *Quests for Conception: Fertility Tourists, Globalization, and Feminist Legal Theory*, 57 HASTINGS L.J. 295, 328 (2005). Alison Bailey notes that “[t]he magic of the global market has transformed surrogate mothers from selfish, crazy, deceitful, and manipulative con artists . . . into the rational, autonomous, ends-choosers of liberal theory and global capitalism.” Alison Bailey, *Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy*, 26 HYPATIA 715, 722 (2011).

<sup>9</sup> Gestational surrogacy has become so accepted and seemingly commonplace that we have begun to see it used as non-controversial plotlines in television shows such as *Friends* (NBC television broadcast), *Rules of Engagement* (CBS television broadcast), *The New Normal* (NBC television broadcast) and at least one major motion picture, *BABY MAMA* (Universal Pictures 2008), starring Tina Fey and Amy Poehler. Moreover, many popular television and movie stars use gestational surrogacy to add to their families, including: Sarah Jessica Parker and her husband Matthew Broderick; Elizabeth Banks and her husband Max Handelman; Nicole Kidman and her husband Keith Urban; Ricky Martin and his former partner Carlos Gonzalez Abella; Elton John and his partner David Furnish; Neil Patrick Harris and his partner David Burtka; and Angela Bassett and her husband Courtney Vance. Most recently in the news, movie mogul George Lucas and his wife Mellody Hobson used gestational surrogacy to produce/gestate their daughter, and reality television star Kourtney Kardashian offered to be a surrogate mother for her sister Khloe Kardashian and her husband, NBA player Lamar Odom. *Kourtney & Kim Take Miami: Babies, Lies, and Alibis: Part One* (E! Network television broadcast March 31, 2013).

<sup>10</sup> *See, e.g.*, LAURA PURDY, REPRODUCING PERSONS 46-47(1996). Purdy argues:

Expecting people to forgo having genetically related children might seem to demand too great a sacrifice of them. But before reaching that conclusion we need to ask what is really at stake. One reason for wanting children is to experience family life, including love, companionship, watching kids grow, sharing their pain and triumphs, and helping to form members of the next generation. Other reasons emphasize the validation of parents as individuals within a continuous family line,

surrogacy has taken on a global dimension. Globalization has led to the development of reproductive tourism, where individuals and couples cross national borders to achieve their reproductive goals. Gestational surrogacy plays a large part in the reproductive tourism industry.

In this essay, I consider some of the ethical issues raised by the rise of reproductive tourism involving gestational surrogacy. After exploring the phenomenon of reproductive tourism as it has developed in India and the ways in which economic globalization has shaped the practice, I then consider two ethical responses to the development of the practice of global commercial surrogacy. The first focuses on the value of autonomy (both as choice and as dignity), and the second on the value of justice. The emphasis on autonomy is found in the response of traditional bioethics, as well as in discussions of reproductive liberalism. The emphasis on justice is generally found in more radical feminist critiques of the practice, including those that focus on reproductive justice.<sup>11</sup> After consideration and critique of these moral values, I move briefly to a consideration of the appropriate legal response: regulation or prohibition. While I believe that neither of these solutions perfectly fits with the values of autonomy as choice, autonomy as dignity, or justice, I nevertheless conclude that given the context in which commercial gestational surrogacy occurs, prohibition is the wiser (but not a perfect) course. Regulation under current conditions of globalization (including commodification and degradation) simply serves to reinforce gender, race, and class hierarchies, diminishing the authentic choices and dignity of the individual, as well as weakening access to reproductive justice, rather than enhancing it.

## I. THE PHENOMENON OF REPRODUCTIVE TOURISM – GLOBAL COMMERCIAL GESTATIONAL SURROGACY

### A. *Reproductive Tourism*

Reproductive tourism is often understood as a part of another phenomenon that is fairly recent: medical tourism.<sup>12</sup> Although medical tourism is usually thought of as involving international travel, it also occurs within national borders.<sup>13</sup> Usually the unavailability or the unaffordability of the desired service at home precipitates the travel.<sup>14</sup> It is in this context that

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children as a source of immortality, or perhaps even the gratification of producing partial replicas of oneself.

*Id.*

<sup>11</sup> See, e.g., Bailey, *supra* note 6, at 715.

<sup>12</sup> Eric Blyth & Abigail Farrand, *Reproductive Tourism—A Price Worth Paying for Reproductive Autonomy?*, 25 CRITICAL SOC. POL'Y 91, 96 (2005).

<sup>13</sup> When someone from Iowa goes to the Cleveland Clinic for health care, it could be thought of as medical tourism. Additionally, when a woman from one state goes to another state to obtain an abortion because abortion is unavailable or restricted in her home state, it could also be thought of as medical tourism. Tourism in this context thus does not mean travelling primarily for relaxation, entertainment or recreation. Rather, it simply refers to travelling for medical services.

<sup>14</sup> For example, because of globalization, we know people travel to the United States or India for cardiac surgery or to Mexico for weight loss surgery. There has been much in the popular press about this phenomenon. See, e.g., Maria Sheahan & Andreas Kröner, *Medical Tourism Industry Holds Major Growth Potential*, REUTERS ONLINE, (Mar. 7, 2013), <http://www.reuters.com/article/2013/03/07/medical-tourism-idUSL5N0B5BY320130307>; See generally *Travelling for Health: The Potential for Medical Tourism*, ECONOMIST INTELLIGENCE UNIT (2011), [http://pages.eiu.com/rs/eiu2/images/Travelling\\_for\\_health\\_Executive\\_summary.pdf](http://pages.eiu.com/rs/eiu2/images/Travelling_for_health_Executive_summary.pdf)(detailing areas of growth for medical Tourism).

global reproductive tourism developed. The Ethics Committee of the American Society of Reproductive Medicine reports that the incidence of cross-border reproductive care (reproductive tourism) is significant; for example, they assert that approximately five percent of all European reproductive medical care involves international or cross-border travel.<sup>15</sup>

Both economic and non-economic incentives encourage medical tourism. The economic incentive is that the cost of the procedure in one's own country is prohibitive and is more affordable in another location. For example, the average cost of commercial gestational surrogacy in the United States falls between \$110,000 and \$150,000;<sup>16</sup> approximately \$25,000 of which is paid to the woman who gestates the fetus.<sup>17</sup> The costs of these services are significantly lower in the former Soviet Union and Eastern Europe. For example, in the Ukraine, the average cost of gestational surrogacy for reproductive tourists is \$45,000, with approximately \$10,000 to \$15,000 of those fees paid to the gestating woman.<sup>18</sup> In India, these costs are even lower; gestational surrogacy clinics charge clients approximately \$25,000, with \$2,000 to \$10,000 of this fee going to the gestating woman.<sup>19</sup> The relatively low cost of "materials" and "services" involved in

<sup>15</sup> Ethics Comm. of the Am. Soc'y of Reprod. Med., *Cross-Border Reproductive Care: A Committee Opinion*, 100 FERTILITY & STERILITY 645, 645 (2013). Their study indicates that the United States receives a fair amount of reproductive tourism with patients coming from Europe and Latin America. *Id.* at 645-46. Others have noted the increase in reproductive travel to the United States from Asia and the Middle East. *See, e.g.*, Seema Mohapatra, *Achieving Reproductive Justice in International Markets*, 21 ANNALS HEALTH L. 191, 196 (2012) [hereinafter *Achieving*].

<sup>16</sup> According to the Northeast Assisted Fertility Group (NAFG), depending on health insurance coverage, IVF costs, the number of medical procedures required, and program fees, using a gestational carrier can cost an average of \$110,000 to \$150,000. The NAFG estimates fees as follows:

NAFG program fee: \$25,500-\$27,000

Carrier compensation: \$40,000 to \$45,000

Egg donor compensation: \$10,000 for an NAFG donor (but no more than \$10,000 . . . ) compensation varies for donors from other programs

Egg donor agency fee: approx. \$3,500 to \$6,000

Catastrophic liability insurance premium (if necessary): \$8,000

IVF costs: approx. \$15,000 to \$30,000 (depending on whether donor egg is used and other factors)

Negotiated private-pay prenatal and delivery expenses (if necessary): approx. \$12,000 to \$20,000

Travel: approx. \$5,000

Legal services (including independent counsel for carrier): approx. \$7,500

*Surrogacy Frequently Asked Questions*, NORTHEAST ASSISTED FERTILITY GROUP, <http://www.assistedfertility.com/faqs/faq-surrogacy.shtml>.

<sup>17</sup> Ethics Comm. of the Am. Soc'y of Reprod. Med., *supra* note 15, at 646, <http://www.assistedfertility.com/faqs/faq-surrogacy.shtml>. Even with the high cost of commercial gestational surrogacy in the United States, the United States attracts intended parents from European and Latin American countries where surrogacy is illegal or unavailable. It is estimated that more than 14,000 children are born to American gestational surrogates for foreign contracting couples. *See* Nara Schoenberg, *Born in the USA*, CHI. TRIB. (Apr. 13, 2011), [http://articles.chicagotribune.com/2011-04-13/health/ct-news-surrogate-mom-20110413\\_1\\_surrogacy-center-for-surrogate-parenting-international-parents](http://articles.chicagotribune.com/2011-04-13/health/ct-news-surrogate-mom-20110413_1_surrogacy-center-for-surrogate-parenting-international-parents); Nara Schoenberg, *New Face of Surrogates: International Couples Seek American Women Because of Stigma, Laws*, THE POST & COURIER, (Apr. 25, 2011), [http://www.postandcourier.com/news/2011/apr/25/25fl\\_surrogates](http://www.postandcourier.com/news/2011/apr/25/25fl_surrogates).

<sup>18</sup> *Achieving*, *supra* note 15, at 195-96.

<sup>19</sup> Bailey, *supra* note 8, at 718. Others estimate that the gestating women are paid closer to \$8,000 for their services. *See* Ethics Comm. of the Am. Soc'y of Reprod. Med., *supra* note 15, at 646; I. Glenn Cohen, *Circumvention Tourism*, 97 CORNELL L. REV. 1309, 1323 (2012)(citing women in Akanksha make \$5,000 per pregnancy and \$6,000 for

gestational surrogacy are largely due to the low standard of living of the women delivering these materials and services, as well as their location in the developing world. In fact, surveys of people who travel internationally for reproductive services indicate that cost is a significant factor in their decision to access reproductive materials and services in a foreign country.<sup>20</sup>

There are, however, a number of non-economic grounds to engage medical tourism. For example, people travel for medical services because of the unavailability of the desired treatment in their own countries.<sup>21</sup> Treatment can be unavailable for a variety of reasons. In individuals' home countries, doctors may lack the equipment or expertise to perform the procedure, or, in countries with universal health care or socialized medicine, the waiting lists for the desired procedure may be too long.<sup>22</sup>

With regard to reproductive tourism, and specifically gestational surrogacy, additional non-economic inducements may drive the practice. These inducements or motivations include situations where the patient belongs to a category of patients ineligible for a given procedure,<sup>23</sup> or the treatment may be immoral or unlawful in the patient's home country.<sup>24</sup> For example, in some countries, gay and lesbian singles and couples are not eligible for artificial insemination, in vitro fertilization, or surrogacy.<sup>25</sup> An additional non-economic factor that drives global commercial surrogacy is the ability of doctors, clinics, and the intended parents to surveil and control the gestating women.<sup>26</sup>

In practice, global commercial gestational surrogacy tourism includes two components: the procurement of ova in one location, and the procurement of a gestational surrogate in another. In the vast majority of cases, both materials and services are procured in countries where women's economic/material conditions are most precarious.<sup>27</sup> For example, the growing

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twins). See also Rama Lakshmi, *In India, Rise in Surrogate Birth for West*, WASH. POST (Jul. 26, 2013), [http://articles.washingtonpost.com/2013-07-26/world/40862935\\_1\\_surrogacy-surrogate-mother-poor-women/2](http://articles.washingtonpost.com/2013-07-26/world/40862935_1_surrogacy-surrogate-mother-poor-women/2) (stating that a surrogate at New Delhi clinic earned approximately \$8,000—12 times her annual earnings as a garment worker); Beth Greenfield, *India's 'Rent-a-Womb' Industry Draws Criticism*, YAHOO! SHINE (Oct. 2, 2013), <http://shine.yahoo.com/parenting/india-s-rent-a-womb-industry-draws-criticism-185434998.html> (stating Akanksha Surrogacy Center in Gujarat, India, pays gestational surrogates approximately \$6,000 for a single pregnancy and \$10,000 for a twin pregnancy).

<sup>20</sup> Ethics Comm. of the Am. Soc'y of Reprod. Med., *supra* note 15, at 646.

<sup>21</sup> Cohen, *supra* note 19, at 1323 (detailing countries that restrict or ban reproductive technologies).

<sup>22</sup> Blyth & Farrand, *supra* note 12, at 96-97; see Cohen, *supra* note 19, at 1323.

<sup>23</sup> Marcia C. Inhorn & Pasquale Patrizio, *Rethinking Reproductive "Tourism" as Reproductive "Exile,"* 92 FERTILITY AND STERILITY 904, 904 (2009).

<sup>24</sup> Cohen, *supra* note 19, at 1323-25; *A Comparative Study on the Regime of Surrogacy in EU Member States*, EUR. PARLIAMENT, POL'Y DEP'T C: CITIZENS' RTS. & CONST. AFF., 15-16 (May 15, 2013), <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=93673> (noting that commercial gestational surrogacy is restricted in a number of European Union member states including, Austria, Bulgaria, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, and Latvia, the Netherlands Portugal, and Spain). Recently, some countries have moved to extend their criminal prohibitions to those who seek gestational surrogacy internationally. See Cohen, *supra* note 19, at 1325.

<sup>25</sup> Inhorn & Patrizio, *supra* note 23, at 904.

<sup>26</sup> For descriptions of methods of surveillance, see Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, 35 SIGNS 969, 981-82 (2010) [hereinafter *Commercial Surrogacy*]; see also Amrita Pande, *"It May Be Her Eggs But It's My Blood": Surrogates and Everyday Forms of Kinship in India*, 32 QUALITATIVE SOC. 379, 385 (2009).

<sup>27</sup> Seema Mohapatra, *Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 BERKELEY J. INT'L L. 412, 439 (2012) [hereinafter *Stateless Babies*] (identifying that, due to

reproductive tourism traffic includes reproductive tourism to Eastern Europe and the United States. Eastern Europe is the “white part” of the former Soviet Bloc—countries like Russia, Slovenia, the Czech Republic, and Romania<sup>28</sup>—and reproductive traffic to the United States is due to “white” egg donors that are readily available.<sup>29</sup> In these countries, where little to no regulation of reproductive technologies and services exists, doctors and clinics use the Internet to attract reproductive tourists from Western Europe, the United States, Asia, and the Middle East with the promise of low cost in vitro fertilization and access to the ova of white women.<sup>30</sup> In fact, the dealing of human ova in Eastern Europe has been compared by some to sexual tourism: young women, in economically fragile and failing countries in the former Soviet Bloc, find that their options for paid labor are very limited—sometimes limited to either egg donation or prostitution.<sup>31</sup> Inhorn and Patrizio maintain:

“limited economic opportunities available . . . many women’s decision to become gestational surrogates stems primarily from the corresponding financial benefits.”)

<sup>28</sup> The benefits of egg donation and surrogacy in Eastern Europe are touted on agency websites. *See, e.g., Why Ukraine*, SUCCESSFUL PARENTS, <http://successful-parents.com/main/ukraine/> (last visited Oct. 1, 2013) (listing the benefits of egg donation and surrogacy in the Ukraine, which include that “Ukraine is a European Country,” “Legislation is Favorable,” “Higher Level of Medical Services at a Reasonable Cost,” “Living Conditions are European Standards,” and “European Type Egg Donors are 100% of our Database”).

Not only are Eastern European women recruited for egg donations in their own countries of origin, they are also recruited by clinics in Western Europe. For example, impoverished immigrant women from Eastern Europe are recruited in Cyprus and in Spain. *See* Scott Carney, *The Cyprus Scramble: An Investigation into Human Egg Markets*, PULITZER CENTER ON CRISIS REPORTING (Aug. 12, 2010), <http://pulitzercenter.org/blog/untold-stories/cyprus-scramble-investigation-human-egg-markets> (reporting that most egg donors in Cyprus “were of Ukrainian, Moldovan, Russian or Romanian descent.” Clinics favor these women “because of their lighter complexion, eyes and hair color. British, German, Italian and American customers tend to favor children with Caucasian phenotypes”); *see also* Scott Carney, *The Price of White Eggs*, PULITZER CENTER ON CRISIS REPORTING (Aug. 12, 2010), <http://pulitzercenter.org/projects/eurasia/price-white-eggs> (noting that the cheapest way to get “white” eggs is to travel to Cyprus or Spain because it is where desperate and poor women are encouraged to sell their eggs for as little as \$1,400. “The donors are mostly refugees from the tattered economies of Eastern Europe who jump at the chance to earn a couple hundred dollars for undergoing potentially dangerous egg harvesting procedures.”).

For a discussion of egg donation by Eastern European women in Spain, see Sven Bergmann, *Fertility Tourism: Circumventive Routes that Enable Access to Reproductive Technologies and Substances*, 36 SIGNS 280, 285 (2011) (“Spanish clinics are particularly active in recruiting Russian women as donors in order to provide British, Scandinavian, and German patients with phenotypically similar donors.”). Bergmann notes, even when purchasers are not interested in phenotype matching, it cannot be avoided in many instances because in some countries, including Spain, clinicians are legally compelled to ensure phenotypical similarity between egg donor and recipient. Bergmann explains that “[p]henotypical matching allows a form of conventional kinship by incorporating bodily traits in the donated substance; it helps recipients and partners to look like a ‘natural’ family. Here, ‘physical appearance can serve as social legitimacy.’” *Id.* at 286.

<sup>29</sup> Lisa C. Ikemoto, *Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services*, 27 J. L. & INEQUALITY 277, 286 (2009) (referencing the popularity of the United States among travelers from Asian, Latin American, and predominantly white countries due to its racial diversity).

<sup>30</sup> Inhorn & Patrizio, *supra* note 23, at 905. Access to the ova of white women is important to Asian and Middle Eastern consumers because of cultural preferences for light skin and eyes. *See Stateless Babies*, *supra* note 27, at 448.

<sup>31</sup> Storrow, *supra* note 8, at 327. American egg donors are usually women who are not impoverished. *See Stateless Babies*, *supra* note 27, at 429-30; Mohapatra notes the increasing use of Eastern European women as gestational surrogates. For example, she notes that in 2011, there were 120 surrogate births reported in the Ukraine, and that the number of actual surrogate births is likely to be higher. *Achieving*, *supra* note 15, at 195.

Furthermore, young women in these countries may comprise a vulnerable population of egg donors, who are compelled out of economic necessity to sell their ova in the local reproductive marketplace. Given the newly recognized category of ‘travelling foreign egg donor’ who seeks economic mobility through the sale of her body parts, unregulated fertility tourism has been compared with sex tourism, as young women in the economically deteriorated post-socialist societies discover that prostitution and egg donation offer economic rewards.<sup>32</sup>

As in other nations, in Eastern Europe, globalization has meant that some “sink[] into abject poverty, while watching a handful of entrepreneurs reap inconceivable wealth as the sole beneficiaries of free enterprise.”<sup>33</sup> The practice of egg donation in Eastern Europe occurs under difficult economic conditions for women. Thus, the structures necessary for reproductive tourism are not limited to gender hierarchy in the developing world. Poverty also motivates individuals and national governments to participate in and promote this type of tourism.<sup>34</sup>

#### *B. Gestational Surrogacy in the Global Context – The Rise of the Reproductive Brothel*

Reproductive tourism has become a normal and accepted part of our global culture. Major newspapers in the United States and popular women’s magazines have covered the phenomenon.<sup>35</sup> Even Oprah did a segment on it, declaring it as a positive example of women helping other women.<sup>36</sup> The most popular destinations are jurisdictions with few or no applicable regulations, and those with rules favorable to the individual contracting for the gestation for custody of the resulting child.<sup>37</sup> As an institution, or practice, global gestational surrogacy consists of a system developed by fertility specialists with the help of local “recruiters,” who make impoverished local women available for gestational surrogacy.<sup>38</sup> While it is practiced in many countries, India is the fastest growing location for commercial surrogacy in the world.<sup>39</sup>

<sup>32</sup> Inhorn & Patrizio, *supra* note 23, at 905.

<sup>33</sup> Edgar Cahn, *Reinventing Poverty Law*, 103 YALE L.J. 2133, 2154 (1994).

<sup>34</sup> See Storrow, *supra* note 8, at 327-28.

<sup>35</sup> See, e.g., Judith Warner, *Outsourced Wombs*, N.Y. TIMES, (Jan. 3, 2008), [http://opinionator.blogs.nytimes.com/2008/01/03/outsourced-wombs/?\\_r=0](http://opinionator.blogs.nytimes.com/2008/01/03/outsourced-wombs/?_r=0); Amelia Gentleman, *India Nurtures Business of Surrogate Motherhood*, N.Y. TIMES, (Mar. 10, 2008), <http://www.nytimes.com/2008/03/10/world/asia/10surrogate.html>; Ellen Goodman, *The Globalization of Baby-making*, N.Y. TIMES, (Apr. 11, 2008), <http://www.nytimes.com/2008/04/11/opinion/11iht-edgoodman.1.11908760.html>; Kritivas Mukherjee, *Rent-a-Womb in India Fuels Surrogate Motherhood Debate*, WASH. POST, (Feb. 4, 2007), [http://www.washingtonpost.com/wp-dyn/content/article/2007/02/04/AR2007020400908\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/02/04/AR2007020400908_pf.html); and Henry Chu, *Wombs for Rent, Cheap*, L.A. TIMES, (Apr. 19, 2006), <http://articles.latimes.com/2006/apr/19/world/fg-surrogate19>.

<sup>36</sup> *Oprah Winfrey Show: Lisa Ling Investigates: Wombs for Rent* (CBS television broadcast Oct. 9, 2007), available at [www.oprah.com/world/wombs-for-rent/1](http://www.oprah.com/world/wombs-for-rent/1).

<sup>37</sup> This corporate model of gestational surrogacy is practiced in a few jurisdictions in the United States, the Ukraine, Russia, Thailand, and India. For a description of American jurisdictions permitting gestational surrogacy see generally Darra L. Hoffman, *Mama’s Baby, Daddy’s Maybe: A State-by-State Survey of Surrogacy Laws & Their Disparate Gender Impact*, 35 WM. MITCHELL L. REV. 449, 460-65 (2008).

<sup>38</sup> *Commercial Surrogacy*, *supra* note 26, at 975-76.

<sup>39</sup> See *id.* at 972-973. Thailand is quickly becoming an international player. Bioethicists Yuri Hibino and Yosuke Shimazono report that Thailand has seen an increase in the number of IVF cycles occurring within its national

The reproductive brothel model first described by Dworkin is the template used in India with the cultivation of surrogacy “hostels.”<sup>40</sup> These hostels are connected (sometimes physically) to the doctors/clinics involved in the surrogacy contracts.<sup>41</sup> The local women live in them while they are part of the gestational surrogacy process (pre and post-implantation).<sup>42</sup> In these hostels, the gestational surrogates are provided for and placed under surveillance to ensure that they providing the best product (i.e., baby) to the contracting individual or couple.<sup>43</sup>

The women providing these services are often the most economically vulnerable. For example, sociologists tell us that almost all of the women who “volunteer” to act as gestational surrogates are poor. Many are illiterate; averaging some middle school, a median family income of \$60 per month, and in one account, 32 out of 42 women reported living below or at the poverty line.<sup>44</sup> However, some of the women used as surrogates are middle class and are better educated.<sup>45</sup> The impact of the global recession has led married, middle class women to act as gestational surrogates in order to pay family medical expenses or to further supplement the family’s income when their husbands lose their jobs.<sup>46</sup> For most surrogates, the fees they receive represent approximately five years of family income.<sup>47</sup>

The purchasers of the services of these women include Westerners, Asians, Middle-Easterners, and prosperous Indians that participated in the Indian diaspora.<sup>48</sup> The purchasers travel to the providing clinic or increasingly using Internet technology such as Skype,<sup>49</sup> look over the available women, to select one to gestate an embryo/fetus for intended parents.<sup>50</sup> Then, the chosen

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borders, and although the practice of commercial egg donation and surrogacy is “regulated” by the Medical Council of Thailand, these activities are not regulated by law. See Yuri Hibino & Yosuke Shimazono, *Becoming a Surrogate Online: “Message Board” Surrogacy in Thailand*, 5 ASIAN BIOETHICS R. 57 (2013). Thailand has even been having difficulties regulating the trafficking of women into Thailand for reproductive purposes. In February 2011, the police arrested Taiwanese brokers for the trafficking of 14 Vietnamese women into Thailand for the purpose of delivering “designer babies” to foreign couples. See *Thai Police Free 14 Women From Illegal Baby-Breeding Farm in Bangkok*, HUFFINGTON POST (Feb. 24, 2011, 10:25 AM), [http://www.huffingtonpost.com/2011/02/24/vietnamese-women-freed-fr\\_n\\_827595.html](http://www.huffingtonpost.com/2011/02/24/vietnamese-women-freed-fr_n_827595.html); *Thai Police Free Women from Surrogate Baby Ring*, AFP (Feb. 24, 2011), <http://www.google.com/hostednews/afp/article/ALeqM5gXBt7gEuqdn14KYH2zcvjZvsFpQ?docId=CNG.e4206a773b164839c18a6b3802794fe5.6dl>; see generally Kerri Ritchie, *Concern as Australians turn to Thailand for Surrogates*, ABC NEWS (Apr. 13, 2013, 4:14 PM AEST), <http://www.abc.net.au/news/2013-04-13/thai-surrogacy-concerns/4624388> (showing a rise in demand of Australians seeking Thai women as surrogates).

<sup>40</sup> *Id.* at 970.

<sup>41</sup> *Id.* at 981.

<sup>42</sup> *Id.* at 981-82.

<sup>43</sup> See *id.* at 981-82.

<sup>44</sup> *Id.* at 974.

<sup>45</sup> See *id.*; Bailey, *supra* note 6, at 719.

<sup>46</sup> Bailey, *supra* note 6, at 719.

<sup>47</sup> *Commercial Surrogacy*, *supra* note 26, at 974. See also Lakshmi, *supra* note 19 (showing surrogate at New Delhi clinic earning approximately \$8,000—12 times her annual earnings as a garment worker); Greenfield, *supra* note 19 (showing Akanksha Surrogacy Center in Gujarat, India, pays gestational surrogates approximately \$8,000 for a single pregnancy and \$10,000 for a twin pregnancy).

<sup>48</sup> Bailey, *supra* note 6, at 719.

<sup>49</sup> See Lakshmi, *supra* note 19.

<sup>50</sup> This process is reminiscent of the way brothels are run. When a man comes in to the brothel, the women available for sex line up so that the man can look them over and choose one that he would like to have sex with. See generally Rebecca Mead, *Letter from Nevada—American Pimp—How to Make an Honest Living from the Oldest*



woman either lives in the clinic with other surrogates, or in a “surrogate hostel” with other surrogate mothers until the child is born and transferred to the intended parents.<sup>51</sup> After a brief period of recuperation, the woman goes back to her home and her family.<sup>52</sup> In either scenario, whether she lives at the clinic or at the surrogacy hostel, the surrogate is heavily supervised daily by either the physician or the physician’s agents.<sup>53</sup>

While currently used only in India, there is no reason to believe that this hostel/brothel model will not or cannot be replicated in other countries, especially in those jurisdictions where regulation or lack thereof, favors the contracting/intended parents and where women live in relative poverty. I believe that this model of gestational surrogacy can even flourish in countries and cultures where surrogacy is frowned upon.<sup>54</sup> For example, gestational surrogates can be placed far away from their communities or, at the very least, be given the choice to leave their communities and live with others in a communal setting. Precedent for such a system can even be found in the United States in the 1950s and 1960s, when there was a movement to remove pregnant teenage girls from their homes to live in maternity homes until the birth of their children.<sup>55</sup> In the case of gestational surrogacy, such a system allows and encourages women who live in communities that might frown upon the practice. The system thus facilitates and provides additional women for whom acting as a gestational surrogate would otherwise be difficult or impossible.

## II. THE ROLE OF RACE, GENDER, CLASS, AND GLOBALIZATION IN GLOBAL COMMERCIAL SURROGACY

### A. *Globalization (and Implications for Gender, Race, and Class Oppression)*

“Globalization” is not a singular phenomenon; rather it is currently understood as a process in which the traditional barriers between peoples, economies, and nations are dissolved in favor of the unfettered movement of ideas, products, capital, and sometimes people, across national boundaries.<sup>56</sup> Although globalization has a long history,<sup>57</sup> globalization in the current era

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*Profession*, NEW YORKER, Apr. 23, 2001, at 74, [http://www.newyorker.com/archive/2001/04/23/010423fa\\_fact\\_mead](http://www.newyorker.com/archive/2001/04/23/010423fa_fact_mead). A similar thing happens at the surrogacy clinic when potential parents come through the door.

<sup>51</sup> *Commercial Surrogacy*, *supra* note 26, at 981-982.

<sup>52</sup> *See id.*

<sup>53</sup> *Id.* at 984. Surveillance is also a part of the sexual brothel experience. The descriptions of this process remind me of the Moonlite Bunny Ranch in Mound House, Nevada. *See Mead, supra* note 50.

<sup>54</sup> In fact, surrogacy is frowned upon in India, and yet the reproductive brothel model is flourishing. *See Amrita Pande, Not An “Angel”, Not A “Whore”: Surrogates As “Dirty” Workers in India*, 16 INDIAN J. OF GENDER STUD. 141, 154 (2009); *see generally* Amrita Pande, “At Least I Am Not Sleeping with Anyone”: Resisting the Stigma of Commercial Surrogacy in India, 36 FEMINIST STUD. 292 (2010)(detailing the stigma Indian women face with surrogacy).

<sup>55</sup> For a full historical account see generally RICKIE SOLINGER, WAKE UP LITTLE SUSIE: SINGLE PREGNANCY AND RACE BEFORE ROE V. WADE (1st ed.1992) (explaining that tens of thousands of white girls and women who became pregnant outside of marriage left home to live in homes for unwed mothers. These girls and women then began a process of giving birth, giving up children for adoption, and returning home, with the expectation that they would act as if nothing had occurred).

<sup>56</sup> JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 9 (1st ed. 2002). For a discussion of the multitude of definitions of globalization, see generally Nayef Al-Rodhan & Gerard Stoudmann, *Definitions of Globalization: A Comprehensive Overview and a Proposed Definition*, GENEVA CENTRE FOR SECURITY POL’Y (2006), [www.gcsp.ch/content/download/1267/9834/file/Definitions\\_of\\_Globalization-A\\_Comprehensive\\_Overview\\_and\\_a](http://www.gcsp.ch/content/download/1267/9834/file/Definitions_of_Globalization-A_Comprehensive_Overview_and_a)

has had the longest reach. This reach has been made possible by advances in transportation and communication technology and the ensuing decrease in costs, which have in turn, made transportation and communication available to a wider range of peoples, businesses, and communities.<sup>58</sup> While globalization may be properly viewed as a “transformative force,” it is important to consider the different ways in which its power is experienced across gender, race, class, and national lines.<sup>59</sup> Globalization has amplified economic disparities between nations and domestically within nations.<sup>60</sup> In a related manner, globalization has had an injurious effect on women, establishing cultural and economic practices resulting in the increasing dependency on women for their families’ subsistence and the financial solvency of the state.<sup>61</sup> Finally, globalization’s obsession with the goals of economic advancement has caused both nations and individuals to overlook the values of equality and anti-subordination.<sup>62</sup>

Globalization’s power to transform “may produce beneficial and disadvantageous effects simultaneously.”<sup>63</sup> Whether or not the process is advantageous or detrimental depends upon where one is located or situated in the economy. In the context of economic activity, globalization (and the accompanying free enterprise and markets) has brought economic prosperity, heretofore unknown, to some.<sup>64</sup> For others, globalization has resulted in severe economic decline.<sup>65</sup> Indeed, when looking at the economic and social distribution of the advantages of globalization, without question, traditional, pre-industrial societies in the developing world have received few benefits, while those in the post-industrial West have garnered most of the benefits of globalization.<sup>66</sup> As Professor Luz Nagle has noted, globalization has mostly “resulted in the movement of investment capital away from developed nations toward regions where labor is cheap, unions have little if any impact, and government policies ranging from environmental to labor regulations favor business

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Proposed\_Definition.pdf.

<sup>57</sup> For a discussion of the history of globalization, see, e.g., KEVIN H. O’ROURKE & JEFFREY G. WILLIAMSON, *GLOBALIZATION AND HISTORY: THE EVOLUTION OF A NINETEENTH-CENTURY ATLANTIC ECONOMY* (1999); Al-Rodhan & Stoudmann, *supra* note 56, at 5.

<sup>58</sup> STIGLITZ, *supra* note 56, at 9.

<sup>59</sup> Balmurli Natrajan, *Legitimizing Globalization: Culture and Its Uses*, 12 *TRANSNAT’L L. & CONTEMP. PROBS.* 127, 129-30 (2002).

<sup>60</sup> Luz Estella Nagle, *Selling Souls: The Effect of Globalization on Human Trafficking and Forced Servitude*, 26 *WIS. INT’L L. J.* 131, 152 (2008) (“globalization has increased and created great inequality among nations and within nations”).

<sup>61</sup> Saskia Sassen, *Women’s Burden: Counter-Geographies of Globalization and the Feminization of Survival*, 71 *NORDIC J. INT’L L.* 255, 257 (2002).

<sup>62</sup> Williams calls this phenomenon, “economic privatization;” Eisenstein argues that this phenomenon leads to the “elimination of public responsibility.” Susan H. Williams, *Globalization, Privatization, and a Feminist Public*, 4 *IND. J. GLOBAL LEGAL STUD.* 97, 97-98 (1996); Zillah Eisenstein, *Stop Stomping on the Rest of Us: Retrieving Publicness from the Privatization of the Globe*, 4 *IND. J. GLOBAL LEGAL STUD.* 59, 61 (1996).

<sup>63</sup> Lauren Jade Martin, *Reproductive Tourism in the Age of Globalization*, 6 *GLOBALIZATIONS* 249, 250 (June 2009).

<sup>64</sup> See Glenda Law, *Globalization, Immigration, and Changing Social Relationships in U.S. Cities*, 551 *ANNALS AM. ACAD. POL. & SOC. SCI.* 89, 90 (1990).

<sup>65</sup> Cahn, *supra* note 33, at 2154.

<sup>66</sup> Timothy K. Kuhner, *International Poverty Law: A Response to Economic Globalization*, 22 *BUFF. PUB. INT. L.J.*, 75, 76 (2003-2004); see also James Gustave Speth, *Toward Security for All: Development Assistance and Global Poverty*, 32 *ENVTL. L. REP.* 10480, 10483 (2002).

enterprise.”<sup>67</sup> These economic arrangements have likewise had a “detrimental effect on national economies, in both the developing and developed world, and given rise to increased levels of poverty worldwide.”<sup>68</sup> Globalization’s costs have been born most heavily by those at the margins of each society.

Thus, globalization plays a part in the creation and amplification of economic and social inequality.<sup>69</sup> This process is dynamic and multifaceted. For example, it is widely understood that, with regard to the international allocation of the advantages or benefits of globalization, many economists and political scientists agree “traditional societies are, at best, at a disadvantage compared to postindustrial societies in reaping gains from economic globalization.”<sup>70</sup> Domestically, globalization results in inequality or in increasing existing inequality because the reduction of trade barriers and investments create a greater gap in the level of opportunity afforded to those who are able to traverse transnational boundaries and those who are not able to do so.<sup>71</sup>

In a discussion of the costs of globalization, sociologist Saskia Sassen argues that globalization has resulted in four inter-related trends. Sassen maintains:

One way of articulating this in substantive terms is to posit that (1) shrinking opportunities for male employment in many of these countries, along with (2) the shrinking opportunities for more traditional forms of profit making in these same countries as they increasingly accept foreign firms in a widening range of economic sectors and are pressured to develop export industries, and (3) the fall in government revenue in many of these countries, partly lined to these conditions and to the burden of debt servicing, have (4) all contributed to raise the importance of finding alternative means for making a living, making a profit and securing government revenue.<sup>72</sup>

Sassen argues that these trends have as their consequence, the institutionalization of “the feminization of survival.”<sup>73</sup> Under globalization, the feminization of survival represents an established practice wherein families are increasingly dependent upon women for their economic survival. And surfacing under this framework, “as significant sources for profit and government revenue enhancement, partly in the shadow economy,” are prostitution, labor migration and illegal trafficking in women and children for the sex industry.<sup>74</sup> Moreover, Sassen emphasizes two important points about the role of government in the feminization of survival. First, she stresses that it is not only families that are dependent upon this income for survival, but so too are governments.<sup>75</sup> In part, it is governments’ dependence on women’s labor that accounts for lax

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<sup>67</sup> Nagle, *supra* note 60, at 152.

<sup>68</sup> *Id.* at 153.

<sup>69</sup> See, e.g., *id.* at 152 (“globalization has increased and created great inequality among nations and within nations”).

<sup>70</sup> Kuhner, *supra* note 66, at 88 (quoting Speth, *supra* note 66, at 10483).

<sup>71</sup> *Id.* at 86.

<sup>72</sup> Sassen, *supra* note 61, at 257.

<sup>73</sup> *Id.* at 258.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

regulation.<sup>76</sup> Second, Sassen stresses that this reliance on women's labor, even in the "shadow" market, is institutionalized.<sup>77</sup> The feminization of survival does not happen simply because of individual or familial decision-making.<sup>78</sup> State support of women's labor, in both the licit and illicit economies, serves to encourage the formation of these dynamics.<sup>79</sup>

Although not considered by Sassen, reproductive tourism is another source of income, profit, and government revenue increasingly surfacing in this global economy where families are reliant on female labor for their economic survival. Blyth's and Farrand's analysis support this observation. They have noted that reproductive tourism, facilitated by low cost travel and communication of the parties, is wholly consistent with globalization trends supported by the European Union, guaranteeing free markets and the free movement of persons, goods, services, and capital throughout its borders.<sup>80</sup> Thus, it is increasingly literally on the backs of women that the economic survival of the family, earning a profit for others, and safeguarding government revenue are accomplished.<sup>81</sup>

Another important gendered and class-based product of globalization is that it characterizes the service of poor women to women of greater economic means as a function of autonomy rather than need or desperation; when in fact, the service of poor women in the global economy often (if not always) comes at the cost of their own needs. Discursively, globalization treats economic relationships as though they are both non-coercive and the result of autonomous decision-making. Anthropologist Balmurli Natrajan argues that this discourse (of non-coercive and autonomous decision making) serves the same function as ideology—it reproduces power by naturalizing it and by obscuring any history of subordination.<sup>82</sup> With naturalization, the power dynamics of the status quo are legitimated.<sup>83</sup> Natrajan argues:

One disguises power by representing particular values (such as independence, mobility, commodity choice) as general human values available (and desirable) to all, and thus concealing the power relations (and its history) between the 'haves' and the 'have-nots.' The other makes adoption of those values (what is really 'power in disguise') appear inevitable or natural (non-coercive, non-imposed, and deriving from laws of human progress), so that any protest or resistance to them will appear reactionary or doomed to failure.<sup>84</sup>

Thus when analyzing the role of poor rural Indian women, Natrajan found that their role in serving the needs of wealthy women was accepted and somewhat glorified.<sup>85</sup> It is then no surprise then that in our globalized economy, the service of poor women as gestational surrogates to wealthier women, to both their countrywomen and foreign-born women, is little questioned by the

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Sassen, *supra* note 61, at 258.

<sup>80</sup> Blyth & Farrand, *supra* note 12, at 96-97.

<sup>81</sup> Sassen, *supra* note 61, at 258.

<sup>82</sup> Natrajan, *supra* note 59, at 129.

<sup>83</sup> *Id.* at 129-30.

<sup>84</sup> *Id.* (emphasis omitted).

<sup>85</sup> *Id.* at 129.

powerful. Rather, their service is viewed as natural, autonomous, and non-coercive.

*B. Global Commercial Surrogacy and Implications for Race, Gender and Class Oppression*

The demographics of the surrogates and the method of operation at the surrogacy clinics and hostels provide some insight into the interwoven sexist, racist, and classist character of the institution of global commercial surrogacy.

At the very least, the practice of global commercial surrogacy is gendered. I say this not only because women are its primary instruments of production, but also because the institution as practiced supports the primacy of the genetic tie, and it supports the notion that the primary role of women is as birth and caregivers. This is true in the developing world where the social status of women is relatively low, and in developed nations where women have achieved a modicum of social, political, and economic status.<sup>86</sup> In developed nations, where women's status, while not as degraded as in the global South, continues nevertheless to be that of second class citizen: their ability to control their lives and their autonomy is contingent upon their willingness and ability to conform to gender norms, especially in the area of reproductive rights and sanctioned mothering roles.<sup>87</sup> Across cultures, perhaps it is in the state sanctioned role of mother that women are subjected to subordination.<sup>88</sup> In the context of surrogacy, while they are being treated as fungible incubators, gestational surrogates are nevertheless fulfilling the accepted gender roles of mothering and nurturing. These women are tolerated and rewarded financially, and they are acceptable because they retain "this defining role of Mother with a capital M."<sup>89</sup>

The institution also includes other coercive and exploitative aspects related to gender. Commercial gestational surrogacy takes advantage of the women's severe economic vulnerability and her vulnerability within the family;<sup>90</sup> by acting as a surrogate she will be able to earn more than most women in her culture. Thus, global commercial surrogacy is often described as emancipating for the surrogate.<sup>91</sup> There is a parallel here to prostitution. Dworkin notes that "[s]ometimes the prostitute is construed to be economically liberated. In selling sex, money passes through her hands: more money than the housewife or the secretary will have in hand on any given night."<sup>92</sup> This seems less like economic liberation, and more like a desperate

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<sup>86</sup> See Ethics Comm. of the Am. Soc'y of Reprod. Med., *supra* note 17, at 648 (arguing that in surrogacy arrangements wealthy women subjugate poorer women).

<sup>87</sup> For fuller discussion, see April L. Cherry, *Roe's Legacy: The Nonconsensual Medical Treatment of Pregnant Women and Implications for Female Citizenship*, 6 U. PA. J. CONST. L. 723 (2004).

<sup>88</sup> Margaret Jane Radin, *What, if Anything, Is Wrong with Baby Selling?*, 26 PAC. L. J. 135, 141-42 (1995) [hereinafter *Baby Selling*].

<sup>89</sup> *Id.* at 141.

<sup>90</sup> Women, particularly those in highly rigid patriarchal families, are often vulnerable to coercion by their husbands or other men in the family to perform gestational surrogacy in order to better the family's economic position.

<sup>91</sup> The economic vulnerability of the women and their families also permits the procurers of the surrogates' services, to feel philanthropic. In reality, they are participating in a transaction that is economically coercive. But the feeling of philanthropy gives them the ability to deny that their part in the transaction may be anything but virtuous. IRIS M. YOUNG, *GLOBAL CHALLENGES: WAR, SELF-DETERMINATION, AND RESPONSIBILITY FOR JUSTICE* 175-76 (1st ed. 2007) [hereinafter *GLOBAL CHALLENGES*]; Anne Donchin, *Reproductive Tourism and the Quest for Global Gender Justice*, 24 *BIOETHICS* 323, 323-24 (2010).

<sup>92</sup> DWORKIN, *supra* note 1, at 176.

exchange.<sup>93</sup>

The potential degradation of people based on race and ethnicity are also part of the institution of global commercial surrogacy. The embryo or embryos transferred to the birth mother's body may or may not be genetically related to the intended parents. The ova and sperm may have been purchased from other sources; often from Eastern European sellers/brokers or from fair-skinned Indian donors where the intended parents are Indian.<sup>94</sup> But, of utmost importance in this process is that the birth mother's ovum are not used; thus the birth mother is not genetically related to the child she bears. Only the birth mother's body is being used for gestation, not her genes or her genetic material.

This practice of egg procurement is an important part of global commercial gestational surrogacy. This system ensures that neither the race/ethnicity nor the social and physical location of the birth mother is important to the process. Thus black and brown women (and their reproductive capacities) from developing nations can be used for the benefit of others (primarily white, European, American, and wealthy).<sup>95</sup> Nevertheless, even in the gestational surrogacy market, the demand is for women with light skin, hair, eye color and other attributes of racial superiority. Alison Bailey notes that this practice suggests that even though the surrogate mother is not genetically related to the child, the importance of the surrogate mother's racial traits continue in their importance because "the racial markers that have historically marked light-skinned women as good mothers and dark-skinned women as bad mothers have been extended to mark 'good' and 'bad' wombs."<sup>96</sup> Thus, commercial gestational surrogacy is another site for the expression of racial preference and oppression.

Surveillance, fungibility, and disposability are present in the institution of commercial gestational surrogacy in the global context. They are integral to the maintenance of oppression structures and are intertwined with oppression based on gender, race, and class.

Surveillance is an essential component of the practice of global commercial surrogacy, and has gender, race, and class implications. While the discourse regarding the surveillance often takes a benevolent tone, the purpose of it is to ensure discipline and control—to ensure the buyers that their investments are being protected.<sup>97</sup> In her interviews with Indian clinicians and hostel workers involved in the surrogacy industry, Pande found that they use benevolence as a way to explain the hostel system:

Desai's [a surrogacy clinician] comment reiterates the need to modernize the women. The untrained mothers need to be kept in the hostel because they cannot be expected to understand the modern methods of motherhood. . . . Scholars of work, especially in global production and factories, have discussed the paternalistic tropes that managers use to justify surveillance of women

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<sup>93</sup> In SPHERES OF JUSTICE, Michael Walzer argues that in a just society, "desperate exchanges" or "trades of last resort" are prohibited, even if the "meaning of desperation is always open to dispute." MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 102 (1983). And although the prohibition of the desperate exchange is a "restraint of market liberty," the restraint is an acceptable one because it reinforces "some communal conception of personal liberty." *Id.* The prohibition of slavery can be understood this framework. *Id.*

<sup>94</sup> Bailey, *supra* note 6, at 719-20.

<sup>95</sup> *Commercial Surrogacy*, *supra* note 26, at 990 (referring to the global commercial surrogacy industry as an instance of the international division of reproductive labor).

<sup>96</sup> Bailey, *supra* note 6, at 720.

<sup>97</sup> *Commercial Surrogacy*, *supra* note 26, at 980.

workers as well as to emphasize the temporary and secondary nature of their employment. The medical staff uses a similar paternalistic narrative for the surrogates, making reference to the illiteracy of these women and their inexperience with modern mothering practices and modern technologies as well as their assumed unfamiliarity with the public space of “real work.”<sup>98</sup>

As many have noted, a sense of philanthropy pervades the Western narratives of reproductive tourism.<sup>99</sup>

Fungibility and disposability are also part of oppressive institutions, especially in the global marketplace,<sup>100</sup> and not surprisingly, it is central to global commercial gestational surrogacy. In this institution, the birth mother, although integral to the process, is treated as though she is fungible.<sup>101</sup> In this context, the women are treated as a means of production. Pande reports that gestational surrogates are reminded by the clinic doctor and others that they are merely uteruses and, as “merely a womb,” she is disposable.<sup>102</sup> Thus, any woman with a working uterus can be used. And because brown and black women are usually deemed to be “cheaper” by the market, they are the most likely to be used. Prostitution works in very much the same way. Dworkin notes:

The brothel model particularly fosters these obfuscation of the female condition because the women are entirely interchangeable; perceived in terms of function they are entirely interchangeable; even among themselves, any one could step out of her own life into the life of the next woman and not notice the difference.<sup>103</sup>

Fungibility and disposability of workers are not just integral features of prostitution; they are also indispensable features of global capitalism.<sup>104</sup> Accordingly, the gestational surrogate mother has come to resemble sex workers and workers in every other industry that has been subject to the forces of globalization—she is fungible and disposable. Thus, global commercial surrogacy embodies the intersection of gender hierarchy, class oppression, subordination based on race and ethnicity, and principles of globalization—economically impoverished third world women providing reproductive services for the benefit of individuals in the first world. Globalization of the practice of commercial surrogacy means that poor women of color from around the world can be used as the means of others’ reproductive purposes.

<sup>98</sup> *Id.* at 983-84.

<sup>99</sup> *See, e.g.,* Ikemoto, *supra* note 29, at 277.

<sup>100</sup> *See* Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1700 (1990) (explaining that it is oppressive to treat essential attributes as fungible because “this denies the integrity and uniqueness of the self”); JAMES H. MITTELMAN, *THE GLOBALIZATION SYNDROME: TRANSFORMATION & RESISTANCE* 67 (2000).

<sup>101</sup> Radin, *supra* note 100.

<sup>102</sup> *Commercial Surrogacy*, *supra* note 26, at 977.

<sup>103</sup> DWORKIN, *supra* note 1, at 176.

<sup>104</sup> *See* MELISSA W. WRIGHT, *DISPOSABLE WOMEN AND OTHER MYTHS OF GLOBAL CAPITALISM* (2006) (arguing that although third world women are treated as if they are disposable under global capitalism, the value of goods that women produce challenges this narrative and the narrative that disposability is inevitable); Tayyab Mahmud, *Debt and Discipline: Neoliberal Political Economy and the Working Classes*, 101 KY. L.J. 1, 17, 36-37 (2012) (arguing that wage compression, inequality, employment vulnerability, contingent workers are all part of globalized capitalist economy).

### III. ETHICAL RESPONSES TO THE PRACTICE OF GLOBAL COMMERCIAL GESTATIONAL SURROGACY

Among the varied ethical responses to the development of the practice of global commercial surrogacy, two types of responses interest me the most. The first type focuses on the value of autonomy, the second type focuses on the value of justice, specifically looking at issues of social justice. Discussions of autonomy are particularly important in the global commercial surrogacy debate because philosophically, globalization is built on the liberal values of autonomy (choice and non-coercion). Nevertheless, even within the liberal tradition that venerates autonomy, there is a countervailing liberal tradition whose focus is an inalienable entitlement to dignity.<sup>105</sup> Because the value of dignity is an important part of liberalism, even those espousing the liberal view must in the end question the practice of commercial surrogacy, especially in its globalized form. Moreover, the value of dignity is also central to social justice concerns.

#### A. *Autonomy and Reproductive Liberalism/Libertarianism*

The value of personal autonomy is central to a variety of moral theories,<sup>106</sup> including Kantian moral theory,<sup>107</sup> the utilitarian/liberal theory of John Stuart Mill,<sup>108</sup> and libertarianism.<sup>109</sup> Generally, personal autonomy means self-governance or self-determination. For both Kant and Mill, personal autonomy entails both the capacity to act on rational thought through the freedom of choice.<sup>110</sup> Accordingly, at the very least, autonomy requires that the individual not only be capable of rational deliberation (in order to be self-governing), but also the individual must be able to act consistently with the choices made. But, modern conceptions of autonomy seem to entail much more. Not only do modern notions of autonomy require the “freedom from coercion, manipulation, and temporary distortion of judgment;” modern notions of autonomy also require the availability of “an adequate set of options.”<sup>111</sup>

<sup>105</sup> Thanks to my colleague James G. Wilson for this observation.

<sup>106</sup> Treiger-Bar-Am explains that in Kantian ethics there are three types of autonomy: unconditional autonomy, the capacity for free choice; autonomy as a positive freedom under Kant’s Categorical Imperative; and autonomy as dignity and respect. See Kim Treiger-Bar-Am, *In Defense of Autonomy: An Ethic of Care*, 3 N.Y.U. J. L. & LIBERTY 548, 555-60 (2008).

<sup>107</sup> Kant’s focus on autonomy is framed as “respect for persons.” IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* §§ 4:412, 4:440 (Mary Gregor ed. & trans., Cambridge University Press 1998); IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS: ON A SUPPOSED RIGHT TO LIE BECAUSE OF PHILANTHROPIC CONCERNS* § 436 (James W. Ellington trans., 2d ed. 1983) (1785); see also JAMES RACHELS, *THE ELEMENTS OF MORAL PHILOSOPHY* 114-24 (1986).

<sup>108</sup> JOHN STUART MILL, *ON LIBERTY* (Elizabeth Rapaport ed., Hackett Publishing Co. 1978) (1859) (Mill’s focus on autonomy discussed as liberty—he asserts that individual liberty can only be overridden to prevent harm to others); see also RACHELS, *supra* note 107, at 79-89.

<sup>109</sup> Robert Nozick, a libertarian theorist, who premises his theory on the notion that each person owns him or herself; as such he presumes autonomy as a fundamental principle. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 273 (1974); see also SUSAN MOLLER OKIN, *JUSTICE, GENDER, & FAMILY* 79-85 (1989).

<sup>110</sup> See, e.g., KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS*, *supra* note 107, at 44 § 440; MILL, *ON LIBERTY*, *supra* note 108, at 11-12; see also Treiger-Bar-Am, *supra* note 106, at 555.

<sup>111</sup> Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 877 (1994) (citations omitted); see also JOSEPH RAZ, *THE MORALITY OF FREEDOM* 373-77 (1986).



### 1. Autonomy as Choice

The emphasis on personal autonomy as choice is found in the response of traditional bioethics. Beauchamp and Childress define autonomy in liberal terms:

Personal autonomy is, at a minimum, self-rule that is free from both controlling interference by others and from limitations, such as inadequate understanding, that prevent meaningful choice. The autonomous individual acts freely in accordance with a self-chosen plan . . . . Virtually all theories of autonomy agree that two conditions are essential for autonomy: (1) liberty (independence from controlling influences) and (2) agency (capacity for intentional action).<sup>112</sup>

Thus, notwithstanding differing theoretical justifications regarding the role of autonomy, personal autonomy is an essential value in bioethics. Autonomy is of the utmost importance in bioethics because, without it, individuals are vulnerable to abuse and exploitation by those who are more powerful.<sup>113</sup> As a result, autonomy is “a fundamental moral precept for health care.”<sup>114</sup>

In political terms, personal autonomy is understood in much the same way. The right to assert one’s own interest without abuse and exploitation of others is central to autonomy and is often realized in the right to freely contract. Under these conceptions of autonomy, autonomy is “self-defining, self-interested, and self-protecting”<sup>115</sup> and any interference in an individual’s autonomy must be justified by extreme circumstances.<sup>116</sup>

Consequently, autonomy, and hence choice, is a fundamental value in both reproductive rights and reproductive technology discourse. As I have noted elsewhere:

Choice is an important part of classic liberalism – which assumes that all citizens have a zone of liberty in which to make intimate decisions. Choosing when or whether to have children has long been deemed part of this liberty. The new reproductive technologies seem to expand our vision of what liberty and choice mean. With technology, reproductive liberty can become not only the right to have or not have a child, but the right to have a child by any technologically available means.<sup>117</sup>

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<sup>112</sup> TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 58 (Oxford Univ. Press, 5th ed. 2001) (citations and emphasis omitted).

<sup>113</sup> Susan Sherwin, *A Relational Approach to Autonomy in Health Care*, in *READINGS IN HEALTH CARE ETHICS* 14, 15 (Elisabeth Boetzkes & Wilfrid J. Waluchow eds, 2d ed. 2000).

<sup>114</sup> *Id.* at 15.

<sup>115</sup> SUSAN SHERWIN, *THE POLITICS OF WOMEN’S HEALTH: EXPLORING AGENCY AND AUTONOMY* 34 (1998).

<sup>116</sup> The right to refuse medical treatment is a right based on the notion that the autonomy of an individual, including to make decisions that might harm him, can be outweighed only by four countervailing state interests: (1) the preservation of life, (2) the prevention of suicide, (3) the ethical integrity of the medical profession, and (4) the protection of innocent third parties. In re *Fetus of Brown*, 689 N.E. 2d 397, 402 (Ill. 1997).

<sup>117</sup> April L. Cherry, *Choosing Substantive Justice: A Discussion of “Choice,” “Rights,” and the New Reproductive Technologies*, 11 *WIS. WOMEN’S L. J.* 431, 433-34 (1997); see e.g., John Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 *VA. L. REV.* 405, 410 (1983).

Thus, it is no surprise that reproductive tourism is often defended as a defense of the autonomy of the individual contracting parties. All forms of reproductive tourism are supported by reproductive liberalism. Liberalism (and liberal feminism for that matter) has as its central commitment that people are autonomous individuals and that it is the protection of that autonomy that is central to the mission of the state. Under liberalism, individuals should be free to choose the course of their lives, including the freedom to contract with anyone, for anything, with very few limits. So what are those limits? Some have argued that there are few limits—that the right to reproductive autonomy includes not only the right to contraception and abortion, but also unfettered access to reproductive technology as a means of reproduction. Under reproductive liberalism and libertarianism, reproductive autonomy is conceived as a negative right against state interference in the absence of compelling justification.<sup>118</sup>

Legal scholar John Robertson, a vocal proponent of reproductive liberalism/libertarianism, recognizes only one limit to what he calls procreative liberty: that is where the exercise of this right causes substantial harm to tangible interests.<sup>119</sup> Tangible interests include harms to individuals, but do not include “harms to personal conceptions of morality, right order, or offense.”<sup>120</sup> Thus, concerns about whether the use of reproductive technologies, including gestational surrogacy, reinforces gender roles, objectifies women as a group by treating women as wombs for hire, or as vessels, or whether the use of women in this way radically alters our notions of pregnancy and motherhood, are not considered substantial harm to tangible interests. Instead, he says that such concerns are simply “differing individual views of such preeminently personal issues.”<sup>121</sup>

Therefore, under reproductive liberalism/libertarianism, anything goes in the name of freedom of choice and freedom of contract. Wealthier women and men get to exercise their “freedom” to choose to reproduce by any means they desire, as long as they can pay for it. While poorer women who find themselves and their uteruses for sale as the object of someone else’s property or desires, are simply in that position perhaps due to market forces, or because of their own lack of will, or failure to “get up and go.” Moreover, under libertarian visions, the presumption is that these economic systems operate in a fair manner.<sup>122</sup> The position of poor women, or of gestational surrogates, in this market, is certainly not the fault of the consumer, and definitely not the fault or responsibility of the state. Under this view, because the state has not caused their poverty or desperation, the state has no obligation to remedy it or protect them from exploitation.<sup>123</sup> This is a classic liberal model: the role of the state is to protect the interest of

<sup>118</sup> See Blyth & Farrand, *supra* note 12, at 102-03.

<sup>119</sup> JOHN ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 41 (1994).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> For example, libertarian Robert Nozick argues in favor of a minimal state; a state whose functions are limited to “protection against force, theft, fraud, enforcement of contracts, and so on.” NOZICK, *supra* note 109, at ix, 297. He asserts that when the state possesses greater power or responsibilities, the individual’s liberty will be violated. Thus, Nozick denounced the notions of distributive justice supported by liberal theorist John Rawls in *A Theory of Justice*. Instead, he argued that only individuals have the right to hold and transfer property/resources not the state; hence his slogan: “For each as they choose, to each as they are chosen.” NOZICK, *supra* note 109, at 160.

<sup>123</sup> This is reminiscent of the United States Supreme Court holding in *Harris v. McRae*, 448 U.S. 297, 316-18 (1980). There the Court noted that poor women’s lack of access to abortion services did not implicate or require any state action to secure their rights—their inability to assert their rights was due to their poverty, not due to the default of any state obligation. *Id.* The Court found that a woman’s freedom of choice did not carry with it “a constitutional entitlement to

individuals in making their choices and contracts, and to enforce those deals where needed.<sup>124</sup> The choices of those who cannot afford to access reproductive technologies (people of color and the poor) are of no concern to the state, are unimportant, and go unsatisfied.<sup>125</sup>

The discourse and debate regarding global commercial gestational surrogacy happens in these liberal terms and often centers on the autonomy of the Indian surrogate mothers. For example, Bailey has found that “popular media coverage bolsters the global infertility industry’s mission by fanning surrogacy work in the language of autonomy, choice, and liberty” depicting the Indian surrogates as pragmatic, autonomous, and rational decision-makers and the surrogacy industry work as “an important expression of free choice between informed adults.”<sup>126</sup> Nevertheless, the women themselves seem to stay away from the language of choice. Instead, when discussing their decision to become a surrogate, they focus on the material conditions of their lives that led them to the “work.” One woman noted: “I know I have to do this for my children’s future. . . . This is not work, this is *majboori* [a compulsion]. Where we are now, it can’t possibly get any worse. . . . The work is not ethical—it’s just something we have to do to survive.”<sup>127</sup> Bailey argues that there are numerous problems with the rhetoric of autonomy and choice, but perhaps most importantly, by “occidentaliz[ing] surrogacy work” it ignores and obfuscates the context in which the work is performed.<sup>128</sup> And under most modern conceptions of autonomy, the adequacy of the available choices is important and relevant.<sup>129</sup> While “adequacy” of options may depend upon the socio-economic context in which the choices are made, there must be some minimum sufficiency of available options.<sup>130</sup> Richard Fallon notes that although the concept of autonomy is “socially situated,” “the judgment of adequacy must have an objective component. The ‘happy slave’ is not autonomous just because her goals and desires have shrunk adaptively to fit the options open to her.”<sup>131</sup> Moreover, the number of choices matters less than the quality of the options that are available to the decision makers; the “richness and variety of options matter more than their aggregate number.”<sup>132</sup>

Thus, when we considered the choices made by gestational surrogates in the global commercial context, even under liberal conceptions of autonomy, we must question whether the choices available to them are sufficient. The reality for many women involved in gestational surrogacy is that it “is one of the few routes to attaining basic social goods such as housing, food, clean water, education, and medical care.”<sup>133</sup> Other scholars have also demonstrated how choice and autonomy rhetoric hide the reality that women who choose employment as a gestational

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the financial resources to avail herself of the full range of protected choices.” *Id.* at 316.

<sup>124</sup> Joan Callahan & Dorothy Roberts, *A Feminist Social Justice Approach to Reproduction-Assisting Technologies: A Case Study on the Limits of Liberal Theory*, 84 KENTUCKY L.J. 1197, 1198-99 (1995-1996).

<sup>125</sup> *Id.* at 1218.

<sup>126</sup> Bailey, *supra* note 6, at 721.

<sup>127</sup> *Id.* at 722.

<sup>128</sup> *Id.*

<sup>129</sup> See Fallon, *supra* note 111, at 886-90.

<sup>130</sup> See Treiger-Bar-Am, *supra* note 106, at 561-62. Treiger-Bar-Am argues that autonomy, understood as the exercise of choice, is dependent on external conditions. She states: “For example, the ability to act autonomously depends upon an amenable political-legal situations and the extent to which socio-economic conditions allow one to function with autonomy.” *Id.*

<sup>131</sup> Fallon, *supra* note 111, at 888.

<sup>132</sup> *Id.* at 888-89.

<sup>133</sup> Bailey, *supra* note 6, at 722.

surrogate have inadequate choices, and in fact may be simply making the best of a double-bind choice.<sup>134</sup> Theorist Andrea Dworkin recognized that double-bind choices regarding women's reproductive capacity are emblematic of women's oppression in the global economy. Dworkin argued:

Again, the state has constructed the social, economic, and political situation in which the sale of some sexual or reproductive capacity is necessary to the survival of women; and yet the selling is seen to be an act of individual will—the only kind of assertion of individual will in women that is vigorously defended as a matter of course by most of those who pontificate on female freedom. The state denies women a host of other possibilities, from education to jobs to equal rights before the law to sexual self-determination in marriage; but it is state intrusion into her selling of her sex or sex-class—specific capacity that provokes a defense of her will, her right, her individual self-defined strictly in terms of the will to sell what is appropriate for females to sell.<sup>135</sup>

Donchin makes this argument clearly in reference to gestational surrogacy when she argues that “the mere fact that a woman sees employment as, say, a prostitute or surrogate as a better option for her than no employment at all does not show that she has made this decision freely.”<sup>136</sup> She further argues that even if the women who employ these gestational surrogates are autonomous actors, given the context in which gestational surrogates live, “it is far more difficult to make the case that impoverished women who offer their services are granting autonomous consent.”<sup>137</sup> Thus by obscuring the economic desperation of the surrogate, “choice talk” diminishes the substantive meaning and exercise of autonomy. “Autonomy” and “choice” in these contexts simply become defenses for subjugation and its discourse becomes just another form of colonization—“discursive colonization.”<sup>138</sup>

Choice talk also obscures the role of globalization and that globalization assumes that the market is liberating. But in fact, globalization and the global market tends to reinforce the status quo of gender, race, and class oppression. For example, globalization has allowed individual

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<sup>134</sup> Double-bind choices are “situations in which options are reduced to a very few and all of them expose one to penalty, censure, or deprivation” and are emblematic of oppression. Marilyn Frye, *Oppression, in THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY* 1, 6 (1983).

<sup>135</sup> DWORKIN, *supra* note 1, at 182.

<sup>136</sup> Donchin, *supra* note 91, at 324.

<sup>137</sup> *Id.*

<sup>138</sup> Bailey, *supra* note 6, at 723. Many scholars have noted that colonization is often used as a way to rationalize viewing subject people as inferior, whose only usefulness is for the most menial purposes. Donchin notes that the “fertility tourist who uses this means to justify hiring a nonwhite woman to gestate a child for her perpetuates this kind of colonialist mindset.” Donchin, *supra* note 91, at 329. Similarly, Margaret Jane Radin talks about the problem with female oppression and market discourse. She asserts that the discourse of commodification can be a harm within itself:

Market discourse does not exist in a vacuum; no discourse does. Market discourse exists within a capitalist culture. The cultural meaning (of course) is what renders worrisome the pricing of what we thought to be priceless. That cultural meaning has to do with our categories of severable, fungible “objects” as opposed to the realm of autonomous, self-governing “persons.”

Margaret Jane Radin, *Reflections on Objectification*, 65 S. CAL. L. REV. 341, 348-49 (1991) [hereinafter Radin, *Reflections*].

desire to supersede the policy of the state. Only the less privileged are constrained by citizenship and government regulation; others can travel abroad to have their reproductive desires fulfilled in the ways in which they desire. Inequality is thereby further reinforced by globalization.

In fact, the autonomy of women used in global commercial gestational surrogacy, and the exercise thereof, is limited by the lack of meaningful choices for earning money.<sup>139</sup> While engaging in commercial gestational surrogacy may be better paying and less stigmatized than selling drugs, being prostituted, or crushing glass, in context we cannot say that it offers women meaningful choice. Thus, even in liberal discourse, it is questionable whether women engaged in global commercial surrogacy are acting autonomously. Women engaging in global commercial gestational surrogacy are exercising their autonomy in the context of the feminization of survival where women's autonomy is severely limited by low social status, poverty, and familial and governmental pressures.

## 2. Autonomy as Dignity

Although the value of human dignity is widely affirmed, and there is much talk about the value of human dignity in various discourses, the meaning of dignity and its requirements have been elusive. Moreover, autonomy and dignity are often talked about in conjunction with each other and often conflated.<sup>140</sup> Our emphasis on autonomy as choice often serves to obscure the fact that philosophically, the concept of autonomy also embraces an entitlement to dignity and respect.<sup>141</sup>

There are numerous foundations of the concept of human dignity. These diverse foundations have led to different meanings of autonomy and sometimes have made it difficult to apply the principle of autonomy in a reasonable and justifiable way. Two notions of dignity are particularly prevalent in contemporary society: the twentieth century notion of human dignity found in constitutions and international declarations, and the Kantian notion of dignity.<sup>142</sup>

<sup>139</sup> See Pamela Laufer-Ukles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L. J. 1223, 1271-74 (2013).

<sup>140</sup> In abortion jurisprudence, the Supreme Court often discusses autonomy and dignity as constituting a singular concept. For example, in *Thornburgh v. American College of Obstetricians and Gynecologists*, the Court refers to the right to abortion as one that is "basic to individual dignity and autonomy." 476 U.S. 747, 772 (1986); see also *Hodgson v. Minn.*, 497 U.S. 417, 462 (1989) (Marshall, J., concurring in part and dissenting in part); *Webster v. Reprod. Health Services*, 492 U.S. 490, 548 (1989) (Blackmun, J., concurring in part and dissenting in part); *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

<sup>141</sup> See, e.g., Fallon, *supra* note 111, at 899; Treiger-Bar-Am, *supra* note 106, at 567.

<sup>142</sup> In a piece commissioned by the United States President's Council on Bioethics, philosopher Adam Schulman argues that are four sources of the idea of human dignity: the classical notion of dignity as "something rare and exceptional" that is "worthy of respect;" the biblical justification of dignity in which humans "possess an inherent and inalienable dignity" because humans are "made in God's image;" the Kantian moral identification of dignity located "entirely in rational autonomy," requiring "equal respect for all persons" and prohibiting "the use of another person merely as a means to one's own ends;" and finally, the twentieth century notion of human dignity found in constitutions and international declarations, though never well-defined, serves "as a placeholder for whatever it is about human beings that entitle them to basic human rights and freedoms." Adam Schulman, *Bioethics and the Question of Human Dignity*, in HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT'S COUNCIL ON BIOETHICS, 3, 6, 8, 10-11, 13 (1st ed. 2008) available at [https://bioethicsarchive.georgetown.edu/pcbe/reports/human\\_dignity/human\\_dignity\\_and\\_bioethics.pdf](https://bioethicsarchive.georgetown.edu/pcbe/reports/human_dignity/human_dignity_and_bioethics.pdf); see also Jacob Dahl Rendtorff, *Basic Ethical Principles in European Bioethics and Biolaw: Autonomy, Dignity, Integrity, and Vulnerability—Towards a Foundation of Bioethics and Biolaw*, 5 MED. HEALTH CARE & PHIL. 235, 237 (2002) (detailing the components of dignity).

The concept of dignity found in twenty-first century constitutions and international declarations plays a part in global culture.<sup>143</sup> The purpose of dignity in these documents is to assist us in determining which duties are owed to individuals by the state—because in political terms, the state is tasked with safeguarding human dignity and protecting individuals from degrading treatment by the state.<sup>144</sup> Although never well-defined, the idea of dignity found in these documents serves “as a placeholder for whatever it is about human beings that entitle them to basic human rights and freedoms.”<sup>145</sup> While important, these twentieth century notions of human dignity are often unhelpful in analyzing any particular situation because they do not spell out the components of dignity with any specificity; rather the notion of dignity in these documents is both “formal and indeterminate.”<sup>146</sup>

The second idea of dignity playing a part in our global culture is the Kantian idea of dignity. In Kantian philosophy, the moral identification of dignity is situated in his concept of “rational autonomy.”<sup>147</sup> One has dignity because one is self-determinative and can make rational choices. Nevertheless, dignity also has requirements. It requires “equal respect for all persons” and prohibits “the use of another person merely as a means to one’s own ends.”<sup>148</sup> In Kant’s theory, dignity is also connected to duty—the duty to respect the autonomy of others.<sup>149</sup> As bioethicist and legal scholar Lois Shepherd has argued: “[w]e respect people because they can make choices (they have dignity), and so we must respect the choices they make (by permitting

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<sup>143</sup> See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810, at 71 (Dec. 10, 1948) (referring to the concept of human dignity in the preamble and stating in Article 1: “All human beings are born free and equal in dignity and rights”); International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR Supp. No. 14, at 47, U.N. Doc. A/6014 (1966) (entered into force Jan. 4, 1969 and ratified by the United States June 24, 1994); and the Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. No. 46, at 193, U.N. Doc. A/34/46 (Sept. 3, 1981) (“the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women”). On the use of the concept of human dignity in the Universal Declaration of Human Rights and human rights law, see Klaus Dicke, *The Founding Function of Human Dignity in the Universal Declaration of Human Rights*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 111–20 (David Kretzmer & Eckart Klein eds., 2002); and Michael J. Perry, *The Morality of Human Rights: A Non-Religious Ground?*, 54 *EMORY L.J.* 97 (2005).

The Vienna Declaration, made at the World Conference on Human Rights in 1993, evoked the importance of dignity in its preamble, stating that “all human rights derive from the dignity and worth inherent in the human person.” Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23 (1993). See also Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl. I (Ger.) art. 1, available at [http://www.gesetze-im-internet.de/englisch\\_gg/](http://www.gesetze-im-internet.de/englisch_gg/) (Basic Law of Germany adopted in 1949-begins with the words: “The dignity of man is inviolable. To respect and protect it is the duty of all state authority. To respect and protect it is the duty of all state authority.”); and Basic Law: Human Dignity and Liberty, 5752-1992 §§ 1(a), 1391 LSI 150 (1991–92) (Isr.) (amended at Basic Law: Human Dignity and Liberty, 1994, S.H. 1454), available at [http://www.knesset.gov.il/laws/special/eng/basic3\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm) (Israel’s Basic Law on Human Dignity and Liberty states: “There shall be no violation of the life, body or dignity of any person as such,” and provides protection for “life, body and dignity”).

<sup>144</sup> See Rendtorff, *supra* note 142, at 237.

<sup>145</sup> Schulman, *supra* note 142, at 13.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 10.

<sup>148</sup> *Id.*

<sup>149</sup> Treiger-Bar-Am, *supra* note 106, at 567; see also Rendtorff, *supra* note 142, at 237.

autonomous action).”<sup>150</sup> However, although part of autonomy, under the Kantian model, dignity is not reduced to autonomy, because while the exercise of one’s autonomy might be limited, the dignity of the person is intrinsic and unconditional.<sup>151</sup> This notion of dignity is especially important because it has become part of our bioethical tradition and part of our bioethical practice. While, understanding that the moral concept of dignity is about respect of the autonomy of others and that it is unconditional is important to the task of considering the morality of global commercial surrogacy, I believe that a more substantive construction is necessary in order to apply these principles. Philosopher Jacob Dahl Rendtorff offers us some of the necessary substance. Rendtorff has argued that dignity, as an “intersubjective” concept,<sup>152</sup> has seven meanings, two are of particular relevance in reference to globalized commercial surrogacy.<sup>153</sup> He argues that as a moral value, dignity “means that every human being must be considered as being without a price and unable to be commercialized;” and that dignity relates to limitations on the degradation to which human beings can be subjected.<sup>154</sup> But dignity means more than this. The value of human dignity protects human beings not only from acts of degradation and humiliation by others. It also protects us from double binds that lead us to acts of self-degradation. Leon Kass makes this point in his essay, *Defending Human Dignity*. He states:

In times past, our successful battles against slavery, sweatshops, and segregation, although fought in the name of civil rights, were at bottom campaigns for human dignity—for treating human beings as they deserve to be treated, *solely because of their humanity*. Likewise, our taboos against incest, bestiality, and cannibalism, as well as our condemnation of prostitution, drug addiction, and self-mutilation—having little to do with defending liberty and

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<sup>150</sup> Lois Shepherd, *Dignity and Autonomy after Washington v. Glucksberg: An Essay about Abortion, Death, and Crime*, 7 CORNELL J.L. & PUB. POL’Y 431, 443 (1997).

<sup>151</sup> KANT, GROUNDING, *supra* note 107, at §4:436.

<sup>152</sup> In defining “intersubjectivity,” theorists Alex Gillespie and Flora Cornish state: “Most simplistically, intersubjectivity has been used to refer to agreement in the sense of having a shared definition of an object. Going beyond simple sharing, it has been defined in terms of the mutual awareness of agreement or disagreement and even the realisation of such understanding or misunderstanding.” *Intersubjectivity: Towards a Dialogical Analysis*, 40 J. THEORY SOC. BEHAV. 19, 19 (2009) (citations omitted).

<sup>153</sup> In reference to the seven meanings of “dignity,” Rendtorff argues:

human dignity has the following meanings as an intersubjective concept: 1) It expresses the intrinsic value of the human being in a community or society. 2) It includes respect for the moral agency of the human subject. 3) It means that every human being must be considered as being without a price and unable to be commercialised. 4) This includes that human dignity refers to the indeterminant position of human beings in the universe—as they are able to create their own destiny. 5) Self-esteem, to be proud, shame, feeling of inferiority and degradation are essentially matters of human dignity expressed in the intersubjective relations between individuals. 6) Dignity can establish restrictions on interventions in human beings in taboo-situations, because of the necessity of human civilised behaviour. 7) Finally, dignity relates to metaphysical experiences of human beings in existential limit by degrading treatment. But the relation between rights and dignity is also essential. In that context human dignity expresses the intrinsic worth and fundamental equality of all human beings.

Rendtorff, *supra* note 142, at 237.

<sup>154</sup> *Id.*

equality—all seek to defend human dignity against (voluntary) acts of *self*-degradation.<sup>155</sup>

In considering the application of the moral value of dignity to the subject of global commercial surrogacy, the harms of exploitation and commodification become even more relevant. If dignity prohibits “the use of another person merely as a means to one’s own ends,”<sup>156</sup> and requires “that every human being must be considered as being without a price and unable to be commercialised,”<sup>157</sup> then it becomes important to determine whether women used in global commercial surrogacy are subject to having their dignity abridged. Furthermore, commodification works to diminish the personhood to those who are the owners of those commodities.<sup>158</sup>

Surrogacy is not just a job. It is an institutional practice that requires a level of female disembodiment not present in other forms of employment besides sexual prostitution.<sup>159</sup> It is the use of women’s bodies primarily for the benefit of others. Moreover, it is uncontested that the process of global commercial surrogacy is one in which the bodies of women are commercialized; the reproductive capacities of their bodies are sold for the benefit of others. There is also degradation involved in global commercial surrogacy.<sup>160</sup> This degradation is captured in the reinforcement of class and racial hierarchies. Class hierarchies are reinforced by the commercialization of gestational surrogacy itself.<sup>161</sup> As already noted, it is an institution that encourages the use of poor women and their bodies for the benefit of the wealthy. Racial hierarchies are reinforced when contracting couples express and reify their preferences for genetic egg and sperm donors with similar (white) racial makeups, and regardless of race prefer lighter-skinned women as gestational surrogates, even though the surrogate provides no genetic material.<sup>162</sup> The choices made by the contracting couples serve to reinforce racist attitudes that

<sup>155</sup> Leon R. Kass, *Defending Human Dignity*, in HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT’S COUNCIL ON BIOETHICS, *supra* note 142, at 297-98.

<sup>156</sup> Schulman, *supra* note 142, at 10.

<sup>157</sup> Rendtorff, *supra* note 142, at 237.

<sup>158</sup> MARGARET JANE RADIN, *CONTESTED COMMODITIES* 163 (1st ed. 1996).

<sup>159</sup> Maddy Coy, *This Body Which is not Mine: The Notion of the Habit Body, Prostitution and (Dis)embodiment*, 10 FEMINIST THEORY 61 (2013) (arguing that narrative of women in prostitution demonstrates that women experience the selling of sex as violating even when they also feel that they are exercising choice or agency); see also CAROLE PATEMAN, *THE SEXUAL CONTRACT* 17 (1st ed. 1988) (prostitution is unique experience because of the dynamic between the body, one’s sexuality, and sense of self).

Here, by female embodiment, I mean women’s way of being in the world and women’s sense of their identity as women, but the connection that I am trying to make is between women’s sense of their identity and the physical use of the female body in intimate ways. Nevertheless, the idea of embodiment is much broader and has been theorized by many feminist scholars. The idea of embodiment attempts to describe the way that the material features of one’s body and what happens to it constitute the self. Thus, the conceptualization of embodiment does not have to include any assumptions that the nature of women’s experiences is independent of culture or socialization. Thus embodiment is influenced by race, gender, class, and cultural forces. In other words, our social position affects the way in which we understand our sense of self. See, IRIS MARION YOUNG, *ON FEMALE BODY EXPERIENCE: “THROWING LIKE A GIRL” AND OTHER ESSAYS* 9 (2005); Catriona Mackenzie, *Conceptions of Autonomy and Conceptions of the Body in Bioethics*, in FEMINIST BIOETHICS: AT THE CENTER, ON THE MARGINS 72, 78-81 (Jackie Leach Scully et al. eds., 2010); see also Coy, *supra* at 67 (agreeing with Gail Weiss that embodiment develops from the way that others view the body).

<sup>160</sup> *Baby Selling*, *supra* note 88, at 143.

<sup>161</sup> Callahan & Roberts, *supra* note 124 at 1224.

<sup>162</sup> See discussion of race, *supra* Sections II.A & II.B.



mark lighter-skinned women as good mothers and stigmatize darker-skinned women as bad mothers, thereby violating the value of dignity.

Finally, the moral value of dignity requires us to look beyond the issue of autonomy as choice, especially when the dignity of the individual is at issue. If human dignity is compromised, even by voluntary acts of self-degradation, then we must defend and protect that dignity—just as we protect and defend dignity from other acts of degradation. In the context of globalization, women who contract to be gestational surrogates not only act in ways that degrade women as a social group (e.g., by participating in an institution that reinforces racist and sexist attitudes and beliefs), they are also participating in an act of self-degradation—degradation that comes from having their bodies (and their selves) treated as disposable and fungible incubators, as if they were merely wombs.<sup>163</sup>

### B. *Feminist Critiques: Relational Autonomy and Reproductive Justice*

Generally, the emphasis on justice is found in more radical feminist critiques of the practice of global commercial gestational surrogacy, including those that focus on reproductive justice.<sup>164</sup> Two of the strands of analysis that focus on issues of justice are relational autonomy analyses and the Reproductive Justice approach.<sup>165</sup> Both approaches stress the importance of context in understanding the ethics of the practice.

Relational autonomy is an understanding of autonomy that rejects the traditional thinking of autonomy as individualistic. Instead, relational autonomy accounts stress “social embeddedness,”<sup>166</sup> in terms of personal relationships, but also in terms of political, economic, and social relationships and focuses on the context in which decision-making is made.<sup>167</sup> As Donchin notes, relational autonomy takes account of the fact that “[o]ppressive social conditions privilege the more powerful and interfere with the opportunities of others to develop skills necessary for exercising autonomy. Unjust prerogatives marginalize many women and minorities, depriving them of their fair share of social goods.”<sup>168</sup> By focusing on context, relational autonomy “remind[s] us of what social fairness requires, it buttresses the claims of socially marginalized

<sup>163</sup> See discussion, *supra* Section II.B; see also *Commercial Surrogacy*, *supra* note 26, at 977 (stating that surrogates are told that they have no connection to the baby).

<sup>164</sup> See, e.g., Bailey, *supra* note 6, at 715 (detailing two frameworks that feminists use in discussing contract pregnancy and fitting those frameworks into the context of reproductive justice).

<sup>165</sup> See *id.* (describing how one approach concerns ethical considerations and the other concerns reproductive justice).

<sup>166</sup> Jennifer A. Parks, *Care Ethics and the Global Practice of Commercial Surrogacy*, 24 *BIOETHICS* 333, 336 (2010). Parks argues that “[o]ur social embeddedness means that we are not the independent objective, and impartial beings that traditional liberal accounts have posited. . . . Furthermore, who we are – and what duties we have with respect to others—is at least partly a function of the social roles we take on and the choices we make.”

<sup>167</sup> See, e.g., JENNIFER NEDELSKY, *LAW’S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW* (2011); Jennifer Nedelsky, *Law Boundaries, and the Bounded Self*, 30 *REPRESENTATIONS*, 162 (1990) (explaining how property sets limits to government intrusion on constitutional rights); Jennifer Nedelsky, *Reconceiving Autonomy*, 1 *YALE J. OF L. & FEMINISM* 7 (1989) (arguing that feminism requires a new conception autonomy that does not emphasize individualism); Sherwin, *supra* note 113 (arguing that people are only equal if they receive equal amounts of civil liberties); SHERWIN, *supra* note 116 (arguing “[s]ince notions of the self are at the heart of autonomy discussions, alternative interpretations of autonomy must begin with an alternative conception of the self”).

<sup>168</sup> Anne Donchin, *Toward a Gender-Sensitive Assisted Reproduction Policy*, 23 *BIOETHICS* 28, 34 (2009).

people to equal treatment and full human rights. Affinity between appeals to autonomy and human rights discourse challenges oppressive practices and gender-specific exploitation across a broad geographical spectrum.<sup>169</sup> Without an accounting for context, the focus on autonomy can cause us to misapprehend whether any decision is ethical; “distort[ing] medical decision-making, perpetuat[ing] a seriously misleading bioethical theory, and contribut[ing] to an unjust regulatory environment.”<sup>170</sup> Without an accounting for context, even the identification or appreciation of harm can be obscured.<sup>171</sup> Finally, this account of autonomy includes an associated duty on the part of those who benefit from oppressive practices to consider the “exploitative dynamic to which they are party, and the kinds of moral, social, and economic relationships they are constructing by engaging in th[e] practice.”<sup>172</sup>

Reproductive justice accounts also focus on the context of decision-making in a determination of its permissibility by “emphasiz[ing] the ways state and commercial control and exploitation of women’s bodies, sexuality, and reproduction are often strategies for controlling communities of color.”<sup>173</sup> In the context of global commercial gestational surrogacy, a reproductive justice framework requires that we consider the harm of the surrogacy “against the background of a woman’s health over her lifetime.”<sup>174</sup> Bailey considers this issue when she inquires about the long-term health consequences that fertility drugs, obstetric complications, and surgery might have on the gestational surrogate.<sup>175</sup> She asks:

Are these risks less morally acceptable in developing-world contexts? . . . Can these harms be written off as occupational job hazards? . . . If surrogates have no legal protection, and if clinic pregnancy rates can be increased by passing on additional risks to surrogacy workers, then we should be concerned that these risks are borne exclusively by some of the most vulnerable people in the world—poor women with extremely limited long-term access to health care.<sup>176</sup>

This means that in order to assess the oppression or justice of gestational surrogacy in the Indian context, we must consider issues such as Indian women’s lack of access to medical care. This includes the lack of prenatal care for their own pregnancies, the high infant mortality rate, the high rate of preventable infertility among Indian women, the high maternal morbidity and mortality rates, the availability of safe and legal abortion, as well as the incidence of disease and malnutrition among women and children.<sup>177</sup> As important to this measuring of justice is an examination of whether or to what degree the state protects the interests of women acting as gestational surrogates. An examination of these questions demonstrates that Indian women are not faring well by any measure.<sup>178</sup>

<sup>169</sup> *Id.* at 34.

<sup>170</sup> *Id.* at 33-34.

<sup>171</sup> *Id.*

<sup>172</sup> Parks, *supra* note 166, at 336. This duty is conceived and outlined by Iris Marion Young. Young refers to this corresponding duty as the “social connection” model. See GLOBAL CHALLENGES, *supra* note 91, at 175-76.

<sup>173</sup> Bailey, *supra* note 6, at 728.

<sup>174</sup> *Id.* at 729.

<sup>175</sup> *Id.* at 732.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 729-31.

<sup>178</sup> For example, Bailey documents the incidence of maternal death and disability, infant mortality, disease

Thus, an analysis of global commercial gestational surrogacy under either the relational autonomy or reproductive justice models can be understood as leading to the feminist question of whether or not the institution is one that helps to maintain these women (or women in general) as an underclass based on gender, race, class, or social location.<sup>179</sup> When we focus on the context in which global commercial gestational surrogacy occurs, we recognize that the women engaged as surrogates face levels of poverty, desperation, low social status, and the resulting double-bind choices that do not comport with our notions of autonomy, dignity, or fairness.

### C. *Achieving Justice?*

In her discussion, Dworkin was critical of the newer reproductive technologies that have led to the institutionalization of global commercial gestational surrogacy. Dworkin wrote that the “issue is not the particular innovation itself—whether it is intrinsically good or bad; the issue is how it will be used in a system in which women are sexual and reproductive commodities already, exploited, with lives that are worthless when not serving a specific sexual or reproductive purpose.”<sup>180</sup> Accordingly, Dworkin’s judgment about the reproductive brothel is grounded in the context in which these technologies have been developed and the context in which they have been and will be used. Context is important if for no other reason because it helps us to assess the limitations on the autonomy of the decision-maker. It helps us assess both whether and why the decision-maker might be acting against her own self-interest. Paying attention to context also helps us to develop solutions. Thus, the focus on context found in both theories of relational autonomy and reproductive justice makes good sense. The focus on context in both types of moral inquires requires us to identify issues of gender and reproductive oppression and then to ask the difficult but appropriate moral questions. In the case of global commercial gestational surrogacy, these questions include:

Should commercial gestational surrogacy be promoted in a country that has an abysmally poor record on women’s health, or that has such an extraordinarily high maternal mortality rate? What does it mean if women who have been historically targeted for sterilization and aggressive contraception policies turn out to be the same women targeted for surrogacy work? . . . Should we be troubled by the fact that a medically vulnerable population is doing such draining and intimate bodily work? Can fully autonomous health and employment decisions be made under these conditions?<sup>181</sup>

Given the harms and moral difficulties of surrogacy in the context of the developing world, it is questionable whether surrogacy can fit into the lives of poor women in a moral way.

The moral problems with global commercial gestational surrogacy identified in this essay do not have easy or self-evident solutions. To cope with the ethical dilemmas posed by the

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and malnutrition among girls and women, lack of access to general medical care and prenatal care, the incidence of child marriage among girls, as well as the limited access to safe and legal abortion for Indian women. Nor does the law protect the interest of Indian surrogates in any reasonable way. Bailey, *supra* note 6, at 729-31.

<sup>179</sup> Callahan & Roberts, *supra* note 124, at 1224, take a similar position.

<sup>180</sup> DWORKIN, *supra* note 1, at 187-88.

<sup>181</sup> Bailey, *supra* note 6, at 734. These same questions should be asked of the institution of gestational surrogacy in the United States where some of the same dynamics exist.

practice, both regulation and prohibition have been used in different jurisdictions; no standard practice has developed.<sup>182</sup> The laws regarding commercial surrogacy in European Union member states are illustrative of the variety of approaches to the issue. Some states, including many former Eastern Bloc nations, have no laws regarding surrogacy.<sup>183</sup> In many of these nations commercial ova sale and surrogacy are booming businesses.<sup>184</sup> Other European Union member states have prohibited commercial surrogacy, but allowed non-commercial or altruistic surrogacy.<sup>185</sup> Finally, others have prohibited all surrogacy within their own borders; some countries criminalize the participation of their citizens, with some having prohibitions with extra-territorial application.<sup>186</sup>

Feminists also have suggested both regulation and prohibition as ways to deal with the moral conundrum. However, neither solution offers an ideal resolution. In particular, feminists who focus on notions of autonomy tend to claim that a regulatory system would balance the interests of the women acting as surrogates and those seeking to employ surrogates.<sup>187</sup> They argue that such a system would reflect the importance of the value of autonomy by allowing surrogacy contracts to be made and enforced, while at the same time offering women acting as surrogates a modicum of protection from exploitation.<sup>188</sup> For example, regulations might be developed in such a way as to provide benefits for women acting as gestational surrogates (and potential children) by placing limits on the profit-seeking practices of intermediaries which are deleterious to the health of gestational surrogates and fetuses they carry. Practices such as the implantation of an unreasonable number of embryos to ensure the likelihood of a pregnancy are detrimental to the health of the pregnant woman and to the health of the children that result from a multiple pregnancy.<sup>189</sup> These practices could be proscribed by a regulatory scheme.<sup>190</sup> A regulatory scheme

<sup>182</sup> Erin Nelson, *Global Trade and Assisted Reproduction Technologies: Regulatory Challenges in International Surrogacy*, 41 J.L. MED. & ETHICS 240, 248 (2013).

<sup>183</sup> Estonia, Lithuania, Poland, Czech Republic, Slovakia, and Slovenia are examples of European Union countries with no prohibitions of any kind regarding surrogacy. See EUROPEAN PARLIAMENT, DIRECTORATE-GENERAL FOR INTERNAL POLICIES, POLICY DEPARTMENT, CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS, A COMPARATIVE STUDY ON THE REGIME OF SURROGACY IN EU MEMBER STATES 15-16 (2013)[hereinafter COMPARATIVE STUDY ON THE REGIME OF SURROGACY].

<sup>184</sup> See *supra* note 24.

<sup>185</sup> Belgium, Denmark, Hungary, Greece, Ireland, the Netherlands, and the United Kingdom are examples of European Union countries that permit non-commercial surrogacy, but ban the commercial practice. See COMPARATIVE STUDY ON THE REGIME OF SURROGACY, *supra* note 159, at 15-16. Criminal sanctions are often imposed for violations of these laws. See, e.g., Surrogacy Arrangements Act (1985) (U.K.) (unenforceability of surrogacy contracts and criminalization of some activities related to commercial surrogacy).

<sup>186</sup> Countries with prohibitionist laws include France, Germany, Italy, and Portugal. See COMPARATIVE STUDY ON THE REGIME OF SURROGACY, *supra* note 159, at 15-16. Portuguese law provides criminal sanctions of up to two years in prison or a fine. See Daniel Gruenbaum, *Foreign Surrogate Mother: Mater Semper Certa Erat*, 60 AM. J. COMP. L. 475, 480 n. 33 (2012) (citing Lei n.º 32/2006 art. 8º, § 1º). Spanish law also prohibits all types of surrogacy, but several court cases have created precedents allowing for children born of surrogacy to obtain Spanish citizenship and passports. See Kimberly M. Mutcherson, *Welcome to the Wild West: Protecting Access to Cross Border Fertility Care in the United States*, 22 CORNELL J.L. & PUB. POL'Y 349, 357-61 (2012) [hereinafter "Welcome to the Wild West"].

<sup>187</sup> See *Stateless Babies*, *supra* note 23, at 443-46 (arguing that in an autonomous surrogacy relationship parents must be able to create a surrogacy relationship with a fully informed surrogate).

<sup>188</sup> *Id.* at 445-46.

<sup>189</sup> *Id.* at 442.

<sup>190</sup> See, e.g., *Welcome to the Wild West*, *supra* note 186, 391-92 (noting that physicians engaged in reproductive medicine in the United States are creating stringent professional standards in order to reduce the number of

might also help women acting as gestational surrogates by shifting more of the profit from agents and intermediaries to the surrogate mother through contract rights. By solidifying the surrogates' contract rights, it is argued, regulation can offer "disadvantaged and uneducated women a way to earn a good income, while simultaneously reinforcing the surrogates' autonomy to make decisions about their own bodies."<sup>191</sup>

On the other hand, the feminist arguments in favor of prohibition focus on the harm of endorsing laws that permit women to engage in the practice of gestational surrogacy. They argue that in the past women have been subjugated in a variety of ways. On the economic front, women's subjugation has taken the form of exclusion from the economy, which has left women impoverished. On the social front, women's primary role in society has been defined as mothering (both biological and social), and this role has been cause for women's subjugation and exclusion from economic and political life.<sup>192</sup> In this context, the institution of commercial gestational surrogacy simply reifies and reinforces women's roles and their subordination. Moreover, both

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multiple pregnancies that result from the use of in vitro fertilization and arguing that these sorts of professional standards could be extended to Cross Boarder Fertility Care).

<sup>191</sup> See, e.g., Kristiana Brugger, *International Law in the Gestational Surrogacy Debate*, 35 *FORDHAM INT'L L.J.* 665, 681 (2012). Brugger discusses possible regulatory schemes modeled on World Trade Organization (WTO) agreements, United Nations instruments, and the International Labour Organization (ILO) based instruments. *Id.* at 688-94. In the end she proposes adoption of an ILO model because:

the ILO's Tripartite Declaration of Principles Concerning Multilateral Enterprises and Social Policy reflects values applicable to international surrogacy, particularly given concerns about the power imbalance between, for example, poor women and the organizations that may wish to lure them into surrogacy service. Furthermore, the ILO's aims and principles appear consistent with human rights.

*Id.* at 694.

Pamela Laufer-Ukles proposes a regulatory scheme based on civil fines. Laufer-Ukles, *supra* note 139, at 1277. She argues that domestic jurisdictions should work to ensure that the domestic system of gestational surrogacy is accessible, so that the use of an international surrogacy market will be less attractive to contracting couples. *Id.* In her system, some international surrogacy would be permitted, however, there would also be fines for contracting couples that use foreign surrogates that are not otherwise approved of by the scheme she outlines. *Id.* She believes that the system she outlines:

would have the likely effect of disincentivizing foreign surrogacy and equalizing the costs of domestic and foreign surrogacy depending on the amount of the fine imposed. Thus, the commissioning couples would have less of an incentive to use foreign surrogates and would hopefully instead use a domestic surrogate under a framework that is less ethically and legally problematic.

*Id.*

Others have suggested modeling international regulations after the United Nations Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (May 29, 1993, 1870 U.N.T.S. 167). See, e.g., Erica Davis, *The Rise of Gestational Surrogacy and the Pressing Need for International Regulation*, 21 *MINN J. INT'L L.* 120, 142 (2012).

<sup>192</sup> In the United States, the social norms pertaining to women's maternal role have been enforced through the power of law. See, e.g., *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (demonstrating that while focusing on women's maternal role, the Court held that the Illinois law that denied the admission of women to the Illinois bar, did not abridge any of the privileges and immunities of the citizens of the United States); *Muller v. Oregon*, 208 U.S. 412 (1908) (illustrating that while focusing on women's maternal role, the Court upheld the constitutionality of an Oregon statute which limited the hours of employment for women only); *State v. Hall*, 187 So. 2d 861 (Miss. 1966) (upholding a Mississippi statute that excluded women from jury service because of their maternal role).

autonomy and dignity are absent in this context. So for these commentators, the argument is “‘Women have always both sold themselves and been degraded for it, so let’s not do more of the same.’”<sup>193</sup>

Neither regulation nor prohibition solves the problems caused by commercial gestational surrogacy. Regulation of the industry does not resolve the ultimate moral problem caused by it and highlighted by justice concerns. We must remember that the market is not necessarily liberating—it tends to reinforce the status quo of gender, race, and class oppression.<sup>194</sup> However, prohibition also seems problematic. My concern here is that although commodification tends to diminish the personhood of those who are the owners of those commodities, prohibition, in a global culture in which the market power is power, harms women because it denies them access to economic power.<sup>195</sup> Peggy Radin long ago identified the problems with prohibition. She argued that we cannot remedy the problem of objectification by banning the exchange, “‘without addressing the subordination that made the exchange seem desirable’” to those that are subordinated.<sup>196</sup> Prohibition then amounts to denying the freedom of choice to people who are already injured by racism, classism, and sexism. Moreover, prohibition closes an opportunity by which oppressed communities (poor women of color) can gain wealth.<sup>197</sup> Can we tell the women whose options are to crush glass or gestate someone else’s fetus that she must crush glass in order to feed her family?

Therefore, we are left with the challenge. What do we do? How do we deal with the context of globalization in which these women struggle? Even with all its problems, prohibition may be the most appropriate response. Although the prohibition of commercial gestational surrogacy may harm a particular woman by limiting her choices and by closing off a method of economic advancement, we must weigh the harms of the prohibition against the harms of permitting the institution to continue. The harms to the individual woman and to women as a community, to which the institution of global commercial gestational surrogacy gives rise, include affronts to autonomy and dignity that result from exploitation, commodification, and the reification of race, class, and gender hierarchies. Therefore, commercial gestational surrogacy is a practice that we should resist. Nevertheless, although I encourage resistance, I am not sure what the content of that resistance should look like. I certainly am not inclined to favor unpaid surrogacy. Unpaid surrogacy simply reinforces gendered norms of womanhood by its focus on the proper role of women as mothers and by reinforcing the cultural requirement that altruism have a

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<sup>193</sup> *Baby Selling*, *supra* note 88, at 142.

<sup>194</sup> *Id.* (arguing that the surrogate acts as a surrogate wife when the actual wife has “‘failed at baby-making’”). Radin argues:

the feminist argument against being able to sell babies, or reproductive services, is parallel to arguments against prostitution. It is not, I think, parallel to arguments against abortion, that is, the pro-life side of the debate, because I think the pro-life arguments are more about religion, and more indeed about the nature of women as mothers, which this type of feminist argument is trying to counteract. So I think there is an asymmetry with abortion arguments, but maybe not with prostitution. . . . [H]ere this argument is saying: Let’s not be so hasty to think that the market is liberating because it treats women as fungible baby machines and we’ve already had enough of being treated as mothers by nature.

*Id.*

<sup>195</sup> *Reflections*, *supra* note 138, at 349.

<sup>196</sup> *Id.* at 347 (citing Scott Altman, *(Com)modifying Experience*, 65 S. CAL. L. REV. 293, 314-15 (1991)).

<sup>197</sup> *Id.* at 347-48.

heightened role in women's decision-making and behavior.<sup>198</sup> Nor am I inclined in favor of sanctions that penalize the children born from such arrangements. For example, both French and Japanese law discourage the use of international commercial gestational surrogacy, by denying citizenship to the resulting children.<sup>199</sup> By stigmatizing the children, these "solutions" to the practice of international commercial gestational surrogacy harm children born as a result of this practice,<sup>200</sup> and fail to protect their human rights,<sup>201</sup> by leaving them "stateless."<sup>202</sup> Neither am I persuaded that criminalizing the behavior of the woman engaged in gestational surrogacy is a fair course of action. Criminalization simply stigmatizes the woman, and does so without stigmatizing the institution. Criminalization may also increase her economic desperation and lead to worsening impoverishment. Moreover, criminalization of the gestational surrogate does nothing to change the context of globalization and poverty in which international commercial gestational surrogacy occurs.<sup>203</sup> Lastly, another source of resistance may be criminalizing the behavior of the intended parents. This solution also gives me a great deal of pause. This solution raises the question of creating domestic criminal laws that have extraterritorial application.<sup>204</sup> Several Australian states have chosen this course of action to discourage commercial surrogacy.<sup>205</sup>

<sup>198</sup> Altruism is often seen as the defining moral characteristic of women. For example, women who do not behave in altruistic ways are considered deviant and as "[p]lacing [themselves] outside female nature and culture." Janice G. Raymond, *Reproductive Gifts and Gift Giving: The Altruistic Women*, in LIFE CHOICES: A HASTINGS CENTER INTRODUCTION TO BIOETHICS 395, 399 (Joseph H. Howell & William F. Sale ed., 2d ed. 2000). See, e.g., CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 24-63 (1982) (discussing how women define themselves in connection to relationships rather than academic or career accomplishment).

<sup>199</sup> In fact, others have commented on the deleterious effect that such rules have on children. For example, not only is surrogacy illegal in France; French law does not permit the state grant citizenship to children born via surrogacy in other countries, even where the child is biologically related to one of its intended parents. See COMPARATIVE STUDY ON THE REGIME OF SURROGACY, *supra* note 159, at 15, 114-120 (granting of passport is unavailable because surrogacy violates an essential principle of French law). See also *Stateless Babies*, *supra* note 23, at 419-20 (referring to the Baby Manji case which entailed difficulty in establishing the Japanese citizenship of a child born to a surrogate in India, where there was no Japanese mother to list on the child's birth certificate); Erin Nelson, *supra* note 182, 245-46 (2013) (detailing two cases involving children born via surrogacy in India; Baby Manji is one).

<sup>200</sup> See Kimberly M. Mutcherson, *How Parents are Made: A Response to Discrimination in Baby Making: The Unconstitutional Treatment of Prospective Parents Through Surrogacy*, 88 IND. L. J. 1207, 1215 (2013) (arguing that the status of parents is important to children born through surrogacy, and that favorable surrogacy laws symbolize a clear commitment to "protecting the most vulnerable nonparty to the contract—the child.>").

<sup>201</sup> See generally Richard F. Storrow, "*The Phantom Children of the Republic*": *International Surrogacy and the New Illegitimacy*, 20 AM. U. J. GENDER SOC. POL'Y & L. 561 (2012) (discussing harms to children arising from the delegitimation of surrogacy); Laufer-Ukles, *supra* note 139, at 1276 ("Criminalization or refusing citizenship is extremely punitive and affects the children as much as the parents. Such prohibitions or criminalizations can serve to stigmatize children and punish innocent children in a manner that fails to protect children's civil rights.>").

<sup>202</sup> See Laufer-Ukles, *supra* note 139, at 1276-77; See generally *Stateless Babies*, *supra* note 23 (illustrating how inconsistencies in laws between countries leave some children of surrogate pregnancies stateless).

<sup>203</sup> In explaining her preferences for regulation of surrogacy, Pamela Laufer-Ukles suggests that given the "problematic nature of international surrogacy, . . . local jurisdictions may attempt to find ways to encourage the use of domestic surrogacy short of outlawing foreign surrogacy. Domestic jurisdictions should take into account that domestic surrogacy is preferable on many accounts than foreign surrogacy." Laufer-Ukles, *supra* note 139, at 1275, 1277.

<sup>204</sup> Richard F. Storrow, *Assisted Reproduction on Treacherous Terrain: The Legal Hazard of Cross-Border Reproductive Travel*, 23 REPROD. BIOMED. ONLINE 538, 541 (2011) [hereinafter *Assisted Reproduction*]; see also Nelson, *supra* note 182, at 248 (2013).

<sup>205</sup> See, e.g., Surrogacy Act 2010 (Qld.), § 56 ("A person must not enter into or offer to enter into a

While they may have discouraged their citizens from engaging in these practices, the prohibitions have resulted in deceptive practices by intended parents to hide the circumstances of their children's births.<sup>206</sup> In Turkey, people who engage in all types of "Cross Border Fertility Care," including purchases of ova and gestational surrogacy services, are subject, if they are caught, to prison terms of up to three years.<sup>207</sup> Even with such harsh penalties, a great number of Turkish women still travel internationally to access the international fertility market, with approximately 2,000 to 3,000 Turkish women traveling abroad each year in order to evade the law.<sup>208</sup> Thus, with a great deal of certainty, we can speculate that criminalization merely drives the practice underground. Moreover, I am apprehensive about the appropriateness of criminal penalties where the behavior criminalized is the product of the larger cultural forces of pronatalism<sup>209</sup> and biologism.<sup>210</sup>

#### IV. CONCLUSION

When Andrea Dworkin first introduced the idea of the reproductive brothel in 1983, most people must have believed that the development of such an institution was impossible—it was an idea more suitable to science-fiction than to real life. However, under the current global economy and culture, her dystopia is difficult to dismiss. Women are gathered together in confined areas and their reproductive capacities sold as commodities. Under this system, the women are fungible; they are easily reduced to what they sell.<sup>211</sup> While the reproductive brothel model is sustained by liberal arguments regarding autonomy as choice, even those arguments must fail. Even the value of autonomy as choice is mitigated by the quality of the choices available when the available options are coercive or impoverished. When the value of autonomy as dignity is considered, the morality of the reproductive brothel is further diminished. Choices made under conditions of exploitation, commodification, and degradation; choices that reinforce gender, race, and class hierarchies are choices that diminish the dignity of the individual rather than enhance it. If we turn to overtly feminist models of justice, then the morality of commercial gestational surrogacy in the global context is even more questionable. By considering the context in which commercial gestational surrogacy occurs, the concepts of relational autonomy and

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commercial surrogacy arrangement. Maximum penalty—100 penalty units or 3 years imprisonment”), available at <http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/S/SurrogacyA10.pdf> (Last visited December 6, 2013).

<sup>206</sup> Nelson, *supra* note 182, at 248; See Louise Hall, *Surrogacy Couple Win Right to Babies but Face Prosecution*, SYDNEY MORNING HERALD, (Jul. 29, 2011), <http://www.smh.com.au/action/printArticle?id=2520905> (illustrating the measures an Australian couple went took to have a surrogate carry their child).

<sup>207</sup> *Welcome to the Wild West*, *supra* note 186, at 372; *Assisted Reproduction*, *supra* note 204, at 541.

<sup>208</sup> *Welcome to the Wild West*, *supra* note 186, at 371-72.

<sup>209</sup> Under patriarchy, pronatalism, the ideology that promotes reproduction, takes on a greater meaning vis-à-vis women. The ideology of pronatalism not only shapes the primary role of women as producing and caring for children, but insists that this role is “natural.” Pronatalism marks childlessness as an inferior choice, and infertility as a defect that needs to be fixed. See Martha E. Gimenez, *Feminism, Pronatalism, and Motherhood*, in *MOTHERING: ESSAYS IN FEMINIST THEORY* 287 (Joyce Trebilcot ed., 1983). Pronatalism is made more complicated by the overlapping ideology of biologism.

<sup>210</sup> Biologism, shorthand for genetic determinism, is an ideology that preferences genetic or hereditary explanations for human behavior and personality traits, including traits that are thought to be attached to racial or class status. See generally, David Skinner, *Racialized Futures: Biologism and the Changing Politics of Identity*, 36 *SOC. STUD. OF SCI.* 459 (2006).

<sup>211</sup> See DWORKIN, *supra* note 1, at 185.



reproductive justice both weigh against the commodification of women's ability to gestate. Thus in the end, I side with those who argue for legal and social bars to the practice. Although I support prohibition, I do so with an understanding that commercial gestational surrogacy in the context of globalization is simply a symptom of the larger disease of tyranny<sup>212</sup> that we may be powerless against, and that treating it doctrinally, with the legal prescription of prohibition, may act to obscure the deeper issues of gender, race, and class oppression. Nevertheless, it is my hope that my ideas and analysis may add to discussions concerning how we might best apply the principles of autonomy, dignity, and justice in order to end oppression and subjugation of women.

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<sup>212</sup> I believe that oppression is a form of tyranny. See Robert H. Jackson, *Address at the University of Buffalo Centennial Convocation, October 4, 1946*, 60 BUFF. L. REV. 283, 286 (2012). Associate Supreme Court Justice Jackson also thought of oppression as a form of tyranny. In discussing the evils of the modern world, he stated:

When we seek to identify the sources of catastrophe in modern life in order that we may inquire whether they will yield to control by law, we find that the chief source is war, another is tyranny—the oppression of individuals and minorities by governments in power. These are ancient evils, they are as old as the race.

*Id.*